401k Annual Audits: Anticipating Serious and Costly Errors, Understanding the Latest SASs

TUESDAY, JANUARY 19, 2021, 1:00-2:50 pm Eastern

IMPORTANT INFORMATION FOR THE LIVE PROGRAM

This program is approved for 2 CPE credit hours. To earn credit you must:

- Participate in the program on your own computer connection (no sharing) – if you need to register additional people, please call customer service at 1-800-926-7926 ext. 1 (or 404-881-1141 ext. 1). Strafford accepts American Express, Visa, MasterCard, Discover.
- **Listen on-line** via your computer speakers.
- **Respond to five prompts during the program plus a single verification code**.
- To earn full credit, you must remain connected for the entire program.

WHO TO CONTACT DURING THE LIVE PROGRAM

For Additional Registrations:
-Call Strafford Customer Service 1-800-926-7926 x1 (or 404-881-1141 x1)

For Assistance During the Live Program:
-On the web, use the Chat function to send a message

If you get disconnected during the program, you can simply log in using your original instructions and PIN.

Correction Options for Retirement Plan Errors

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | October 5, 2020

Posted by Maria T. Hurd, CPA

In a highly regulated industry with complicated rules that always have exceptions (except when the exception does not apply) it is inevitable that sooner or later a failure to follow the plan document will take place. Such operational errors can be corrected through the IRS Employee Plan Compliance Resolution System (EPCRS) in one of three ways:

1. **Self-Correction Program (SCP) –** Recognizing that certain errors are common, the EPCRS program offers pre-approved ways for plan sponsors to self-correct insignificant errors at any time, and significant errors by the last day of the second plan year after the error occurred, or by the last day of the third year in the case of ADP/ACP test violations.
2. **Voluntary Compliance Program (VCP) Submission to the IRS Requesting Approval for a Specific Correction Method –** When a significant error is not timely corrected, the plan sponsor would like to deviate from a pre-approved correction method, or the error is not correctable under SCP (such as participant loan violations) the plan sponsor should submit a VCP application, which requires the payment of a fee. VCP applications can be done anonymously to avoid a commitment, but the IRS will not delay an audit if an anonymous VCP application is in progress, as opposed to a regular submission.
3. **Audit Closing Agreement Program (https://www.irs.gov/Retirement-Plans/Audit-Closing-Agreement-Program-General-Description) (Audit CAP) –** If the error is discovered during an IRS audit, the plan sponsor will pay a sanction greater than the VCP fee. Understandably, the goal of the IRS is to encourage self-correction and self-reporting under VCP, so the sanction amount is meant to dissuade taxpayers from taking a risk that the error may never be caught.
4. **Employee Plan Voluntary Closing Agreement Program –** Plan sponsors seeking a closing agreement to resolve retirement plan errors that are not eligible for correction under EPCRS, such as excise tax, deductibility, or funding violations can make a request for approval of a correction that they suggest, and propose a sanction to the IRS through the Employee Plan Voluntary Closing Agreement (https://www.irs.gov/Retirement-Plans/Employee-Plans-Voluntary-Closing-Agreements) for which there is more detail on the IRS website.

When a plan error is identified, the plan sponsor and its service providers must make several determinations:

Self-Correction vs. VCP

Is the error insignificant?

The first step is to determine whether the error is insignificant based on a number of subjective factors including:

- The number of participants affected as a percentage of the plan
- The correction amount per participant
- The percentage of plan assets of the correction involved
- The number of years that the error took place
- The contribution amount as a percentage of annual contributions
- The reason that the error occurred

If the error can be deemed to be insignificant, it is eligible for self-correction at any time if:

- The plan has a favorable determination letter or equivalent
- The plan sponsor has established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance with the law
- The plan is not under examination by the IRS

The correction of significant errors not corrected by the last day of the second year after the error is made, correction methods that are not pre-approved by the EPCRS program, and errors not eligible for self-correction (such as loan violations) should be submitted for approval through a VCP application.

Self-correction does not involve a filing or a fee, but VCP submissions do.

Effective January 2, 2018, Rev. Proc. 2018-4, updated VCP fee schedule to use a fee structure *based on assets* rather than participants. The minimum fee of $1,500 doubled or tripled what plans would have paid even one day earlier. A picture is worth 1,000 words, so the following chart summarizes the significant changes in the VCP fee structure:

<table>
<tr><th colspan="2">Previous Fee</th><th colspan="2">Fee Effective
February 1, 2016</th><th colspan="2">Fee Effective
January 2, 2018</th></tr>
<tr><th>Number of Participants</th><th>Fee</th><th>Number of Participants</th><th>Fee</th><th>Total Assets</th><th>Fee</th></tr>
<tr><td>20 or fewer</td><td>$750</td><td>20 or fewer</td><td>$500</td><td rowspan="3">$500,000 or less</td><td rowspan="3">$1,500</td></tr>
<tr><td>21 to 50</td><td>$1,000</td><td>21 to 50</td><td>$750</td></tr>
<tr><td>51 to 100</td><td>$2,500</td><td>51 to 100</td><td>$1500</td></tr>
<tr><td>101 to 500</td><td>$5,000</td><td rowspan="2">101 to 1,000</td><td rowspan="2">$5,000</td><td rowspan="3">Over $500,000 – $10,000,000</td><td rowspan="3">$3,000</td></tr>
<tr><td>501 to 1,000</td><td>$8,000</td></tr>
<tr><td>1,001 to 5,000</td><td>$15,000</td><td rowspan="2">1,000 to 10,000</td><td rowspan="2">$10,000</td></tr>
<tr><td>5,001 to 10,000</td><td>$20,000</td><td rowspan="2">Over $10,000,000</td><td rowspan="2">$3,500</td></tr>
<tr><td>More than 10,000</td><td>$25,000</td><td>More than 10,000</td><td>$15,000</td></tr>
</table>

As illustrated above, the largest plans benefitted from a fee reduction that over time, went from $25,000 to $15,000, to $3,500, whle plan sponsors with 20 or fewer articipants now pay $1,500, which is triple the previously applicable fee of $500. Similarly, reduced fees for loan and RMD errors were eliminated completely, as the following chart shows:

<table>
<tr><th colspan="2">Loan Failure Fees
(thru January 2, 2018)</th><th colspan="2">MRD Failure Fees
(thru January 2, 2018)</th><th colspan="2">Loan Failure and MRD Failure Fees
(effective January 2, 2018)</th></tr>
<tr><th>Number of Participants with Loan Failures</th><th>Compliance Fee</th><th>Number of Participants with RDM Failures</th><th>Compliance Fee</th><th>Number of Participants with Failures</th><th>Compliance Fee</th></tr>
<tr><td>13 or fewer</td><td>$300</td><td rowspan="3">150 or fewer participants</td><td rowspan="3">$500</td><td colspan="2" rowspan="5">No longer available</td></tr>
<tr><td>14 to 50</td><td>$600</td></tr>
<tr><td>51 to 100</td><td>$1,000</td></tr>
<tr><td>101 to 150</td><td>$2,000</td><td rowspan="2">151 – 300 participants</td><td rowspan="2">$1,500</td></tr>
<tr><td>Over 150</td><td>$3,000</td></tr>
</table>

This means that a plan with $500,000 in assets and one single loan failure would pay $3,000 , while a plan with$300,000,000 in assets and 150 loan failures would pay $3,500. The new schedule may result in smaller plans rolling the dice with their own self-corrections, rather than opting for the security of a VCP filing.

Making Participants Whole: Does Materiality Play a Role?

As one would expect, both the IRS and the DOL favor participants and expect corrections to put them in the position they would have been in had the error not taken place. However, the regulators recognize that there are practical aspects to plan corrections and that sometimes, there is a need to make estimates. As such, there are certain permitted exceptions to full correction of plan errors. For example:

- Corrective distributions of $75 or less
- Distributions for which the costs of delivery are higher than the distribution amount
- Recovery of overpayments to participants of $100 or less

Note that the exceptions to full correction eliminate the need to make de minimis distributions or eliminate the requirement to recover funds from a participant who erroneously received an overpayment.   If the participant who is owed an omitted contribution is still employed by the company, the IRS would likely prefer that a restitution be deposited, even if an estimate has to be made to complete the correction in a cost-effective manner. For example, an employer that misses a series of elective deferral deposits into the plan can assume that all missed contributions would have been made on the midpoint of the plan year, or portion of the plan year in which the omission occurred. This method is a practical alternative to computing up to 52 separate interest calculations. In this case, the results of an exact calculation would not be significantly different than those of an estimated contribution date in the midpoint of the omission period. To make the participants whole, interest must generally be allocated to their accounts when a correction requires an additional deposit.

In the end, plan errors are likely to occur and the vast majority of plan sponsors prefers to restore participant accounts to the position they would have been in had the mistake not been made. Administratively, the Self-Correction Program tends to be the favored method over a more costly and time consuming VCP application, but when the errors are significant, or stray from the pre-approved methods, the peace of mind of an official IRS approval can be what an employer needs. Careful consideration must be given to all the options.

What are the Available Safe Harbor Plan Formulas?

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | October 5, 2020

Posted By Maria T. Hurd, CPA

Contrary to popular belief, company owners and highly compensated employees (HCEs) are not guaranteed the opportunity to contribute the maximum 401(k) contribution limit to their company's retirement plan, even if the 401(k) deferral contributions represent their own money. That is because 401(k) plans are subject to nondiscrimination tests to ensure that a disproportionate share of the elective deferrals are not those of the HCEs.

In general, the Actual Deferral Percentage (ADP) Test and the Aggregate Contribution Percentage (ACP) Tests limit the amount that HCEs can contribute and have their contributions matched based on the average contributions of and the matching contributions to the Non-highly compensated employees (NHCEs) as follows:

If the Average Deferral/Match Percentage of NHCEs is:	Then the maximum average ADP/ACP of HCEs is:
Less than 2%	2 times the average for the NHCEs
Between 2% and 8%	Average NHCEs plus 2%
More than 8%	1.25 times the average NHCEs ADP

The discrimination tests can be avoided if the employer sponsors a safe harbor plan. Safe harbor plans allow employers to disregard the nondiscrimination test, if they make a generous, pre-approved employer contribution amount to all eligible employees. The minimum safe harbor employer contribution formulas available are as follows:

1. Traditional Safe Harbor Plan Match

1. A 100% vested dollar-for-dollar match up to 3% of compensation, plus 50 cents for every dollar for the next 2% of compensation, or better, which is often effectively dollar-for-dollar up to 4% of compensation.

2. Automatic Enrollment Safe Harbor Plan Match

1. An automatic enrollment safe harbor plan is called a Qualified Automatic Contribution Arrangement (QACA). The safe harbor match contribution for a QACA is 100% of elective contributions up to 1% of compensation and 50% of elective contributions between 1% and 6% of compensation, or better. This contribution can be subject to a 2-year cliff vesting schedule. This is effectively a 3.5% Matching contribution.

3. Nonelective 3% contribution

1. A 3% nonelective contribution to all eligible participants is available for both a traditional safe harbor plan and a QACA.

4. Nonelective 4% contribution

1. A 4% nonelective contribution opportunity is available for plan sponsors who wait too long to declare a 3% contribution. Any time after the 30th day before the end of a plan year through the last day of the subsequent year, an employer can retroactively elect to contribute a 4% nonelective safe harbor contribution.

The following chart may make it easier to remember the available formulas:

Type of Safe Harbor Plan	Deferral	Match	Compensation Limit
Traditional Safe Harbor Plan	$1	$1	Up to 3% eligible compensation
100% Vesting	+ $1	.50c	For the next 2% of eligible compensation or better. (Often $1 for $1 up to 3.5%)

Automatic Enrollment Safe Harbor Plan-QACA	$1	$1	Up to 1% of eligible compensation
2-year-cliff-vesting	+$1	.50c	Between 1% and 6% of eligible comp. or better. (Often $1 for $1 up to 3.5%)
Traditional Safe Harbor and QACA	3% Nonelective Contribution to all Eligible Participants		
Traditional Safe Harbor and QACA	4% Nonelective Contribution to all Eligible Participants if declared between 12/3/CY and 12/31/Next Year		

When the Internal Revenue Code is involved, nothing is ever reduced to a simple chart without additional caveats and conditions, such as the following additional requirements:

- For administrative simplicity, employers can provide a QACA match of $1 for $1 up to 3.5% of eligible compensation.
- Also for administrative simplicity, employers can choose an automatic enrollment deferral of 6%, the maximum deferral amount that can be matched
- There cannot be allocation conditions, such as a last day of employment requirement, to receive a safe harbor contribution
- The definition of eligible compensation must be nondiscriminatory
- Safe harbor contributions cannot be withdrawn before age 59½, except for hardship reasons, if the plan permits
- Qualified Automatic Contribution Rates (QACA) must be a uniform percentage of eligible compensation, cannot exceed 15% of compensation, and must satisfy the following minimum percentages:
    - 3%: First eligibility period ending on the last day of the year following the eligibility year
    - 4%: Second year
    - 5%: Third year
    - 6%: Fourth year
- The plan must generally be in place before the beginning of the year so that timely written notice of safe harbor match contribution may be distributed to all eligible employees between 30 and 90 days before the beginning of the plan year.
- Enhanced match formulas are available if they meet the following requirements:
    - The enhanced match must be at least as generous as the basic match;
    - Deferrals in excess of 6% of compensation may not be matched
    - The rate of match may not increase as deferrals increase; and
    - The rate of the match may not be greater for HCEs than for NHCEs.
    - For an example computation of an enhanced match, please refer to our previous blog How to Order a Triple Stack Match for your Plan (https://employeebenefitplanaudit.belfint.com/how-to-order-a-triple-stack-match-for-your-plan/)
- Additional contributions to the safe harbor may trigger discrimination testing.
- For additional discussion of discrimination testing and available corrections, please refer to Leveling Out ADP and ACP Tests with Refunds, QNECs/QMAcs, Bottom-Up QNECs, or One-to-One Contributions (https://employeebenefitplanaudit.belfint.com/leveling-out-adp-and-acp-tests-with-refunds-qnecsqmacs-bottom-up-qnecs-or-one-to-one-contributions/) and Explaining Discrimination Test Refunds to HCEs (https://employeebenefitplanaudit.belfint.com/explaining-discrimination-test-refunds-to-hces/).

The SECURE Act eliminated the notice requirements for safe harbor plans with nonelective contributions, but not for match plans. Additionally, it added the opportunity for employers to amend the plan to provide a 3% nonelective safe harbor contribution at any time before the 30th day before the plan's year end or 4% up to December 31 of the following year for a calendar year plan. As a practical matter, a plan that failed the discrimination tests would have had to distribute the contributions that caused the failure of the test to the HCEs by March 15th, so amending the plan to provide a 4% nonelective contribution after March 15th may not make sense as a practical matter. However, the opportunity to elect a 3% or 4% nonelective contribution after the plan year has already begun, or even retroactively for the previous plan year will allow employers who can afford a safe harbor nonelective contribution to safeguard their Highly Compensated Employees' ability to contribute the maximum 401(k) deferral limit of $19,500 for the years 2020 and 2021, while allocating a generous employer contribution to the NHCEs.

In a year in which providing novel distribution opportunities as discussed in our blogs Unsaving for Retirement in Pandemic Times (https://employeebenefitplanaudit.belfint.com/covid-19-unsaving-retirement/) and Unsaving for Retirement in Pandemic Times – Part II (https://employeebenefitplanaudit.belfint.com/qualified-individual-covid/) has become necessary, this opportunity to close the retirement income gap with additional contributions is a win-win for the employers and the participants who take advantage of the SECURE Act's safe harbor rules.

Photo by: Karthikeyan K (https://www.flickr.com/photos/ratkutti/11619481845/in/photolist-iYqJhD-dqJFaQ-ew9ZJu-51R4wY-fvH5ur-auHwWr-6hRUcG-fvXJgo-21cG5Vs-fvX1xu-rRAi1c-rihcR8-eSM2BK-dqJvKX-2i8NTFs-e67dAr-dqJD29-7JV16q-ofcYha-dqJzPi-dqJAdp-pJfD9h-r1z9hZ-nB9T5H-i8Rd7V-qUTc7B-qXRPD8-4rdZ1d-coJwQW-oAGbbu-2jNvrUm-2jNz3Tb-X5qD1C-p6r8ya-rA5V39-oAGsGL-coJxd1-rz7JYL-x7iHZe-x4rqXL-2jNvrTV-E8Yv18-coJwV7-oADXUm-6DQc7X-rhDmzs-iGLT8T-jNrCDA-jNq8Ta-dJLD9C)(License (https://creativecommons.org/licenses/by-nd/2.0/))

How Do I Correct Late Salary Deferral Deposits?

By Chris Ciminera, CPA, QKA (https://employeebenefitplanaudit.belfint.com/author/chrisciminera1234/) | April 28, 2020

Posted by Christopher J. Ciminera, CPA, QKA

Update – April 29, 2020

On Wednesday, April 29, 2020 the Employee Benefits Security Administration (EBSA) also posted a Disaster Relief Notice 2020-01 (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01). In this notice, the EBSA provides relief to plan sponsors regarding the possibility of lags in deposits due to the recent COVID-19 issues which was addressed in my blog below. Additional details regarding this Notice will be discussed in my next blog to be posted shortly.

Original Post – April, 28, 2020

Late deposits of employee 401(k) and 403(b) deferrals continue to be a common error we find while performing plan financial statement audits, which is consistent with the top ten list of mistakes the Internal Revenue Service (IRS) and Department of Labor (DOL) identify during their audits and investigations. When employee deferrals are not deposited timely, there are two available correction avenues: self-correction or completing a filing through the DOL's Voluntary Fiduciary Correction Program (VFCP). In this blog, I will discuss the rules regarding the timely deposit of salary deferral withholdings, when a timely deposit doesn't occur, the steps the plan sponsor must take for each of the available correction options.

What is Considered Late?

Unfortunately, unlike the seven-day safe harbor provided for small plans, the DOL doesn't specify a black and white safe harbor deposit time frame with universal applicability to all large plans. In fact, the official requirement for large plans is that a plan sponsor must deposit deferrals to the trust as soon as the assets can be segregated from the employer's funds, but in no event can the deposit be later than the 15th business day of the month following the month of withholding. Unofficial guidance emphasizes that patterns of deposit will be analyzed on a case by case basis to determine what "timely" means to each employer. Hence, plan sponsors can withhold salary deferrals and deposit that money to the trust within one day, then any lag outside of that time frame could be considered a late deposit. Of course, certain instances may cause a lag outside of the administrative pattern that may be deemed "as soon as possible." Examples may include: a payroll employee is sick and can't process the deposit as quickly as normal, there is a power outage or computer software malfunction and systems can't process payroll as quickly as normal, there is a change in service providers and there is a lag in the new custodian being able to receive the deposits, etc. It is important in these cases that the plan sponsor document the reason for the lag in case the IRS or DOL reviews deposits and questions the lag. These examples are not necessarily "get out of jail free cards," but may be considered an acceptable reason for the lag in a world that has many moving parts. As an auditor, we'll ask the plan sponsor for more details and explanations on those lags in deposit while communicating the above rules. It is ultimately up to the plan sponsor to determine that a lag is a late deposit, but we always communicate the risk that the DOL may not agree with the employer's documented justification for an unusual delay. As a side note relating to the current COVID-19 pandemic, it may be possible that due to changes in the work environment, the administrative lag of depositing employee deferrals may change. I don't believe it would be necessarily an issue if there was a change in deposit lag (for example a change from one day to two) because of additional burdens presented or changes in processes due to remote working. However, it is important to note that plan sponsors still need to deposit payroll withholdings as soon as administratively feasible. The DOL will not be any more lenient, and most likely will enhance scrutiny, with a plan sponsor utilizing employee funds for business purposes during this time period.

So if you, as the plan sponsor, determine that a salary deferral has not been been deposited timely, is it a big deal?

What is the Effect on the Plan of a Late Salary Deferral Deposit?

The reason late salary deferral deposits are a problem is that they constitute a prohibited transaction between the plan sponsor and the plan. A late salary deferral deposit is considered a loan from a plan to the plan sponsor. This loan is a prohibited transaction that must be fixed by depositing lost earnings on the principle and paying an excise tax. The excise tax is waived once every three years for employers who choose to submit a VFCP filing.

So what are the options for corrections? As noted above, a plan sponsor may self-correct or submit a filing through the DOL's Voluntary Fiduciary Correction Program (VFCP).

Self-Correction of Late Salary Deferrals

When a plan sponsor decides to self-correct late salary deferral deposits, an allocation of lost earnings must be made to each participant's principal amount. This makes up for the lost opportunity to accumulate investment earnings had the dollars been invested in the plan.

The benefits of self-correcting the error are the plan sponsor avoids the time to prepare the application or potential professional fees for the preparation of the VFCP application. The drawbacks, as you will see, are that the plan sponsor may not use the DOL online calculator to calculate missed earnings, the plan sponsor does not get the exemption from excise taxes, and plan sponsor does not get documentation from the DOL that provides the DOL will not investigate the plan for the late deferrals.

As just mentioned, and as you will see in the next section, the DOL has an online calculator to determine lost earnings, but this may only be used for plans filing under the VFCP. Some acceptable methods of earnings calculation in a self-correction format include using the greater of the actual rate of return for the plan participant, the average rate of return for the plan or the target date funds when using the QDIA is appropriate, or using the Internal Revenue Code underpayment rates (the federal short-term rate plus three percentage points) as noted in the following:

- IRC 6621 Table of Underpayment Rates (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/table-of-underpayment-rates)
- IRS Factor Table 1-3-13% (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/irs-factor-table-1)
- IRS Factor Table 2-14-24% (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/irs-factor-table-2)

As a practical alternative, plan sponsors can choose to apply the rate of return for the best performing fund of the plan to the principal amount. Numerous practitioners use the DOL calculator even when the plan sponsor chooses to self-correct. Industry advocacy groups are currently lobbying for the DOL calculation to be an officially accepted method to use for self-correction.

In addition to depositing lost earnings to affected participants' accounts for the affected payroll(s), a FORM 5330 must be prepared for payment of excise tax, which is usually 15% of the amount involved for each year. Since the amount involved is defined as the earnings on the missed deferral, the excise tax tends to be an insignificant amount, often smaller than the professional fees incurred for the preparation of the form. As a best practice, the plan sponsor should also review its processes for transmitting salary deferrals to try to prevent future deposit delays.

Voluntary Fiduciary Correction Program (VFCP)

The second option is correcting the late salary deferral deposits through the DOL's VFCP.

The benefit of the VFCP is that the plan sponsor receives a "no-action" letter (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/no-action-letter) from the DOL. This letter states that the DOL will not investigate the plan solely for the transaction corrected using the VFCP.

To use this correction, the plan or plan sponsor can't be under investigation, generally by the DOL, IRS, PBGC, or other governmental agencies.

The DOL has a webpage (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs) that provides very detailed and helpful notes on the program.

The following is a summary of the procedures:

- As a self-correction, the plan sponsor must contribute lost earnings to affected participants for the affected payrolls. In this case, the plan sponsor may now use the DOL's online calculator. (https://www.askebsa.dol.gov/VFCPCalculator/WebCalculator.aspx) However, the lost earnings calculator is not required. Plan sponsors may perform manual calculations, including those noted above in the self-correction section.
- Next, a plan sponsor would have to complete the VFCP Application Form (https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/model-application-form.pdf). The plan sponsor will have to provide information to the DOL on the form, include proof of correction (including proof of subsequent deposit of principal amounts for the late deferrals, proof of the lost earnings deposited to the plan, etc.)
- In conduction with filling out the VFCP Application Form, the plan sponsor will need to complete the VFCP Checklist (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/checklist) to verify that the application is complete.
- The DOL has adopted a class exemption that provides excise tax relief if the terms of the program are met.
- The VFCP Checklist, Application, and Backup Documents must be provided to the EBSA field office.

In conclusion, the benefits of self-correction are that plan sponsors avoid the procedure, time, and possible fees from service providers in preparing the application form. Self-correction does not allow the sponsor to utilize the DOL online calculator and will not exempt the sponsor from excise taxes on the prohibited transaction. On the other hand, the benefits of filing a VFCP application include receiving a "no-action" letter from the DOL and avoiding the excise taxes, but professional fees to prepare the submission sometimes exceed the cost of the correction. The choice generally boils down to the significance of the omission and the plan sponsor's desire to receive that "no-action" letter from the DOL.

EBSA Disaster Relief Notice 2020-01 – Correcting Late Salary Deferral Deposits

By Chris Ciminera, CPA, QKA (https://employeebenefitplanaudit.belfint.com/author/chrisciminera1234/) | April 30, 2020

Posted by Christopher J. Ciminera, CPA, QKA

On Tuesday, April 28 my blog, "How Do I Correct Late Salary Deferral Deposits? (https://employeebenefitplanaudit.belfint.com/correct-late-salary-deferral-deposits/)," was posted. Coincidentally, the very next day the Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2020-01 (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01) was posted. In this notice, the EBSA provides relief to plan sponsors regarding the possibility of lags in deposits due to the recent COVID-19 issues. The recent guidance supports my position in my previous blog that a lag in deposit due to COVID-19 issues wouldn't necessarily be considered a prohibited transaction. It is important to note that the guidance mentions a specific time period from the beginning on March 1, 2020 and ending on the 60th day following the announced end of the national emergency that would fall within this guidance. The notice specifically indicates that the DOL "will not – solely on the basis of a failure attributable to the COVID-19 outbreak – take enforcement action with respect to a temporary delay in forwarding such payments or contributions to the plan." As has always been the case but still expressed in the notice by the EBSA, "employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances."

The EBSA Notice 2020-01 does provide some needed peace of mind to plan sponsors in these extraordinary times and late salary deferral deposits is just one of the relief allocations addressed in the notice. Stay tuned for a future post for additional information.

Safe Harbor Match Notice Not Distributed

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | November 17, 2020

Posted by Maria T. Hurd, CPA

Distributing a Safe Harbor Match Plan Notice Slipped Through the Cracks. What is the Correction?

The barrage of changes introduced by the SECURE Act, closely followed by the CARES Act, along with furloughs, remote work, and all the work-life changes of pandemic year 2020 may have resulted in administrative errors in plan operations, such as missed notice distributions. So now what? The IRS has correction programs for that – "EPCRS"!

Making Participants Whole

The IRS correction programs are based on the premise that an employer should correct plan operation errors by putting participants in the position they would have been in had the error not been made.

What to do When "*There's No Way to Know What Might Have Been*"

But how does an employer know what a participant would have done had he or she received a safe harbor notice? When "there's no way to know what might have been," unlike the band Little Texas, the IRS does not let us try not to think about it, since we can't go back again.

Instead, the IRS makes us think about it and determine the impact on individual participants.

No Harm, No Foul

If the employee is a continuing plan participant who has clearly been informed of the plan's features and the process for electing to make deferrals, the failure to provide the notice is just an administrative error without consequence, and the employer can revise its procedures to ensure that notice distribution takes place in the future.

Exclusion of an Eligible Employee Correction

However, if the missing notice results in an employee not being able to make elective deferrals to the plan because the person also had not been informed about the plan or how to make deferrals, then the correction is the same as the EPCRS correction for exclusion of an eligible employee. When eligible employees are not given the opportunity to defer, the employer must generally deposit corrective contributions to replace the participant's **missed deferral opportunity** and **missed matching contribution**, as defined in EPCRS.

Missed Deferral Opportunities – Safe Harbor Match Plans

For plans with a safe harbor match formula, an employee's missed deferral is the greater of:

- 3% of compensation, or
- the maximum deferral percentage for which the employer matches at a rate at least as favorable as 100% of the elective deferral made by the employee.

Corrective Contributions

In turn, the **missed deferral opportunity** that the employer must deposit as a corrective contribution, according to the IRS Fix it Guide (https://www.irs.gov/retirement-plans/fixing-common-plan-mistakes-failure-to-provide-a-safe-harbor-401k-plan-notice) updated as of May 15, 2020, amounts to 50% of the missed deferral, as defined above. The corrective contribution amounting to 50% of the missed deferral was the option available under Revenue Procedure 2013-12. However, the employer may want to consider alternative corrective contribution options provided by EPCRS for missed deferrals and eligibility errors.

Additional correction options were added in later updates to the EPCRS if the employer also provides a notice of the failure to affected participants. Although all the correction options are included in the most recent EPCRS Revenue Procedure 2019-19, it was originally Revenue Procedure 2015-28 that eliminated the requirement to contribute a QNEC if deferrals begin by first payroll on or after the three-month period when a failure to withhold occurs. Thereafter, if the deferrals begin within two years of the end of the plan year in which the operational failure occurred, the employer may contribute 25% of the missed deferral instead of 50%. Lastly, if the plan is a Qualified Automatic Contribution Arrangement, no QNEC is required if deferrals start within 9½ months of the year after the failure occurred. This deadline coincides with the extended due date of Form 5500.

To use these alternative correction options, the employer must distribute a notice to the affected participants no later than 45 days after the deferrals begin. The notice must contain:

1. General information relating to the failure, such as the percentage of eligible compensation that should have been deferred and the approximate date that the compensation should have begun to be deferred.
2. A statement that appropriate amounts have begun to be deducted from compensation and contributed to the plan.
3. A statement that corrective contributions have been made (or will be made).
4. An explanation that the affected participant may increase his or her deferral percentage in order to make up for the missed deferral opportunity, subject to applicable limits under section 402(g).
5. The name of the plan and plan contact information (including name, street address, e-mail address, and telephone number of a plan contact).

Missed Employer Match

Under all correction options for the deferral, the employer must deposit 100% of the match that would have been allocated to the participant for the missed deferral, plus lost earnings.

Other Corrective Actions

In addition to making corrective contributions as described above, the employer should distribute the missed notice as soon as possible and obtain deferral elections from the affected participants, review the plan's procedures for issuing notices, including elections not to participate as a best practice, and maintain a calendar with due dates for notices and filing deadlines, including timely distribution of all notices. The employer must ensure that administrative procedures are changed as necessary to prevent the error from happening again. Plan operation errors are common, so as they happen, it's important to do as our parents taught us and "Don't Let It Happen Again!".

Required Minimum Distribution (RMD) Under the SECURE Act

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | November 10, 2020

Posted by Maria T Hurd, CPA

Updated November 11, 2020

The CARES Act gave us a Required Minimum Distribution (RMD) holiday during 2020, but the SECURE Act's new RMD rules will be back in 2021. How will the changing rules affect financial statement audits?

RMDs under the SECURE ACT

The SECURE Act (Setting Every Community Up for Retirement Enhancement Act) changed the Required Minimum Distributions (RMDs) age prospectively. Terminated participants who are not 5% owners of their employers and should reach age 70 ½ after 2019 must take their first RMD by the April 1 of the later of (i) the year after they reach age 72 or (ii) the year after they retire. Five percent (5%) owners must begin their RMDs by April 1 of the year following the year they turn 72, even if they do not retire.

The RMD rules apply to all employer-sponsored retirement plans and IRAs, including Roth 401(k) accounts, but not Roth IRAs while the owner is alive. Distribution of RMDs is a per plan requirement so participants do not have the option of taking their RMD amounts attributable to balances in multiple retirement plans from only one of the plans. However, 403 (b) contract owners can calculate the RMD separately for each 403(b) contract they own, and then take the full RMD from only one or some of the 403(b) contracts.

Failure to Make RMDs: Whose Fault is It?

Failure to make an RMD is considered an operational error that could negatively affect the qualified status of the plan and all of the participants. For this reason, failures to make RMDs must be corrected even if the missed distribution is immaterial to the financial statements.

Plan sponsors cannot assume that their responsibility is limited to ensuring that the recordkeeper is sending RMD notices. The notices often do not reach the participants, and sometimes, recordkeepers only distribute the amount that the participant requests, which may be insufficient to satisfy the required minimum.

The Correction Options

The Employee Plan Compliance Resolution System (EPCRS) offers various correction options to plan sponsors who fail to make Required Minimum Distributions (RMD).

Self-Correction Program (SCP)

Plan sponsors can self-correct minor operational errors under SCP at any time, which is convenient and cost-effective, but in the case of missed RMDs, there is a downside that may affect the participants. Under SCP, the participant-owed excise tax under Internal Revenue Code (IRC) 4974 is not automatically waived.

An onerous excise tax of 50 percent is imposed on the amount of the RMD not received by the participant and is paid with the participant's individual federal tax return for the year the RMD was not taken, through Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax Favored Accounts (https://www.irs.gov/pub/irs-pdf/f5329.pdf). In certain situations, the IRS may waive the penalty if the taxpayer attaches a letter explaining that the RMD failure or shortfall was due to reasonable cause and that steps are being taken to catch up the payments.

Voluntary Correction Program (VCP)

If the administrator determines that the failure to make RMDs was not a minor error, the failure can be corrected through the IRS VCP. Under VCP, the plan sponsor would pay a fee to submit a suggested correction method to the IRS for approval, including a request to forgive the affected participant's excise tax. The submission is made on Form 14568-H, Schedule 8: Failure to Pay Required Minimum Distributions Timely. (https://www.irs.gov/pub/irs-pdf/f14568h.pdf)

An RMD Holiday: The CARES Act Waives RMDs for 2020

In March of 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act waived the RMD requirement for defined contribution retirement plans for any distribution attributable to the year 2020 and any first time RMD attributable to 2019 that would have been paid by April 1, 2020.

RMDs that had already been taken could be rolled over through August 31, 2020. Any other distributions taken during 2020 are treated as eligible rollover distributions, even if they represent what would have been an RMD. Lastly, if the participant is a Coronavirus Affected Individual (CAI), as defined by the Act, then the distribution is a Coronavirus Related Distribution (CRD), and the participant has three years to roll over the distribution to the distributing plan, if permitted, to another retirement plan, or to an IRA. Additional CRD administration specifics are beyond the scope of this blog.

Potential Audit Procedures for RMDs

As was the case when auditing RMDs under the old rules, some typical audit procedures financial statement auditors perform include:

- For 2021 audits, sorting the census to isolate terminated participants 72 years or older and 5% owners over 72, as well as identifying participants with continuing RMD requirements.
- Verifying relevant participant data, such as age and employment status.
- Selecting the sample of required minimum distribution eligible participants who will be tested.
- Recomputing minimum distribution amount based on the participant account balance.
- Verifying proper coding on Form 1099-R.
- Requesting cancelled check. Alternatively, auditors sometimes confirm receipt of distributions and participant data with the participants.
- If applicable, reviewing recordkeeper's SOC 1 report for exceptions in the minimum distribution processes.
- Verifying missing participant location processes are in place, if applicable.

Conclusion:

The shift in the RMD age from 70 ½ to 72 will not change the audit procedures performed, but the RMD holiday gives us an opportunity to revisit a plan sponsor's administrative responsibilities and see whether the processes in place for 2021 RMDs are designed to prevent operational failures. In many cases, changes in the law lead to mistakes when systems and processes are not updated timely. In those cases, correction programs are available to make things right.

How do the new Required Minimum Distribution rules under the SECURE Act affect financial statement audits?

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | April 8, 2020

Posted by Maria T. Hurd, CPA, RPA

The New Law

The SECURE Act (Setting Every Community Up for Retirement Enhancement) changed the age at which non-5% owners who have terminated employment with a retirement plan sponsor must take required minimum distributions (RMD). Participants who reach age 70½ after 2019 must take their first RMD by the April 1 of the later of the (i) year after they reach age 72 or (ii) the year after they retire. Five percent (5%) owners must begin RMDs by April 1 of the year following the year they turn 72, even if they do not retire.

The RMD rules apply to all employer-sponsored retirement plans, including Roth 401(k) accounts, but not Roth IRAs while the owner is alive. Distribution of RMDs is a plan requirement. Participants do not have the option of taking their RMD amount attributable to balances in multiple retirement plans, but only from one of the plans. However, 403(b) contract owners can calculate the RMD separately for each 403(b) contract they own but take the full RMD from only one or some of the 403(b) contracts.

Potential Operational Errors

Failure to make an RMD is considered a plan qualification error that could negatively affect all the participants. For this reason, failures to make RMDs must be corrected even if the missed distribution is immaterial to the financial statements.

Plan sponsors cannot assume that their responsibility is limited to ensuring that the recordkeeper is sending RMD notices. Most recordkeepers also provide missing participant locator services.

The Correction Options

The Employee Plan Compliance Resolution System (EPCRS) offers various correction options to plan sponsors who fail to make Required Minimum Distributions (RMD).

Self-Correction

Plan sponsors can self-correct minor operational errors under the Self-Correction Program at any time, which is convenient and cost effective, but sometimes it comes at a cost. Under SCP, the participant-owed excise tax under Internal Revenue Code (IRC) 4974 is not automatically waived.

The excise tax is paid with the participant's individual federal tax return for the year the RMD was not taken, through Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax Favored Accounts (https://www.irs.gov/pub/irs-pdf/f5329.pdf). In certain situations, the IRS may waive the penalty if the taxpayer attaches a letter explaining that the RMD failure or shortfall was due to reasonable cause and that steps are being taken to catch up the payments.

Voluntary Correction Program (VCP) Application

Under VCP, the plan sponsor would submit a suggested correction method to the IRS for approval, including a request to forgive the affected participants' excise tax. The submission is made on Form 14568-H, Schedule 8: Failure to Pay Required Minimum Distributions Timely (https://www.irs.gov/pub/irs-pdf/f14568h.pdf).

Timing is Everything: The Implementation Complexities of the SECURE Act

The Secure Act was signed on December 20, 2019. Guidance from the IRS is needed to interpret the provisions. For example, under prior law, financial institutions would have needed to notify IRA owners who attained age 70½ in 2020 about their 2020 RMDs by January 31, 2020. Some recordkeepers had already communicated to participants that their 2020 RMD distributions would not be rollover-eligible, which is now incorrect information. On January 27, 2020, the IRS issued Notice 2020-6 to provide relief to financial institutions who had issued RMD statements for 2020. The Notice clarifies that the IRS will not consider a statement to be incorrect if the financial institution notifies IRA owners that no RMD is due for 2020 by no later than April 15, 2020.

Since the Notice does not address the issue of rollover eligibility of distributions that may have already been taken, the American Society of Pension Professionals and Actuaries (ASPPA) has requested transition relief that would permit a late rollover for the affected individuals.

Potential Audit Procedures

As was the case when auditing RMDs under the old rules, some typical audit procedures financial statement auditors perform include:

- Sorting the census to isolate terminated participants 72 years or older and 5% owners over 72
- Verifying relevant participant data: age, years of service to recompute vesting
- If applicable, reviewing recordkeeper's SOC 1 report for exceptions in the minimum distribution processes
- Selecting the sample of required minimum distributions that will be tested
- Recomputing minimum distribution amount based on the participant account balance
- Verifying proper coding on Form 1099-R
- Requesting cancelled check. Alternatively, auditors sometimes confirm receipt of distributions and participant data with the participants.

Conclusion

The simple shift in the RMD age from 70½ to 72 will not change the audit procedures performed, but the change in timing gives us an opportunity to revisit a plan sponsor's administrative responsibilities, the implications of operational failures, the correction options available, and the guidance we still need regarding transitional relief available to those who complied with the old rules after the SECURE Act had already become effective. Although ignorance of the law is not supposed to be an available defense, sometimes good faith compliance deserves some leniency.

Why Should Taking a Hardship Distribution be a Hardship?

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | January 7, 2021

Posted By: Maria T. Hurd, CPA

Taking a hardship distribution should not be, in itself, a hardship to a participant going through challenging times, nor should it be an administration hardship to the employer trying to help. Although obtaining documentation to substantiate a hardship is not, in itself, difficult, missing hardship backup is one of the most common operational errors we find during financial statement audits. The reason is that every party involved thinks someone else is responsible for obtaining the backup, so nobody does it. To make matters worse, some large recordkeepers had erroneously taken the position that self-certification from participants was permissible, both by stating that there was no other financing available to meet the need and also for the hardship reason and amount.

Do More Options Make It Simpler?

Now, both alternatives are options:

- backup documentation for the hardship reason and amount can still be required, or
- the participant can self-certify the hardship reason, amount, and financial necessity, **in writing**, including a statement that the information provided is truthful and accurate. If self-certification is used, the employer must provide written notification of the taxability of the distribution, the rules regarding the definition of hardship and limitations, and the requirement that the participant maintain the backup.

Self-certification facilitates automation of the hardship approval by the recordkeeper; however, electronic approval of hardship distribution requests through the plan webstation is not always the default. Thus, we continue to find instances in which neither backup nor compliant self-certifications were obtained for hardship distributions. Unfortunately, self-certification does not mean that an email or a phone call from the participant is sufficient.

Safe Harbor Definition of Hardship

The issuance of ineligible hardship distributions is another common error we find during our audits. Sympathetic employers tend to forget that the plan cannot be changed to reflect their wishes regarding available hardships without a written amendment. In this case, when you wish upon a star, it makes no difference who you are. The employer cannot change the reasons for which hardships are granted without a plan amendment and doing so could affect the qualified status of the plan. Most pre-approved plans default to the Treasury Regulations' safe harbor definition of a hardship. Those regulations provide for a "safe harbor" listing of events, all of which are deemed to meet the Internal Revenue Code's requirements for hardship distributions, which makes the process of determining qualification for a hardship distribution easier for the plan administrator. As a result, most plans limit the qualifying events for a hardship distribution to this list:

- Medical expenses for the participant, spouse, children, dependents, or his or her primary beneficiary, if they would be deductible under Code section 213(d), disregarding the requirement that they exceed 10% of adjusted gross income;
- Costs relating to the purchase of the participant's principal residence (excluding mortgage payments);
- Tuition and related educational fees and room and board expenses for up to the next 12 months of post-secondary education for the participant or his or her spouse, children, dependents, or designated beneficiary;
- Payments necessary to prevent the participant's eviction from, or foreclosure on, his or her principal residence;
- Burial or funeral expenses for the participant's deceased parent, spouse, child, dependent, or primary beneficiary;
- Expenses for the repair of damage to the participant's principal residence that would qualify for the casualty deduction under Internal Revenue Code section 165, disregarding the requirement that the damage was caused by a federally declared disaster; and
- Expenses and losses (including loss of income) incurred by the participant on account of a federally declared (i.e., by the Federal Emergency Management Agency (FEMA)) disaster, if the participant's principal residence or place of employment was in the area designated by FEMA for individual assistance with respect to the disaster.

If the participant's parents have medical expenses, or the participant's mortgage payments are late, but there is no eviction notice, or the participant's niece or nephew needs tuition assistance, or the participant's cat needs surgery, or any other costly and unfortunate situation strikes the participant or someone they care for, but is not a hardship reason permitted in the plan, the employer has to consult the document provider regarding the possibility for an amendment that could make it possible to assist the affected participant. Many employers don't realize that the safe harbor hardship reasons are not the only hardship reasons permitted in a defined contribution plan.

Audit Procedures for Hardship Distributions

In September 2019, Final Regulations were published regarding hardship distributions from 401(k) plans. Although many of the rules regarding hardship distributions were relaxed, the new leniency is often optional, so the auditor will not assume that your plan adopted all the new options, such as available sources for a hardship distribution including the participant's entire 401(k) account, or that maximizing all available participant loans is no longer required. For these previously mandatory requirements to be eliminated, the plan sponsor must actively choose to implement the more lenient provisions. Conversely, 403(b) plans cannot choose to offer hardship distributions from earnings on deferrals, or from employer contributions, including QNECs, QMACs, or safe harbor contributions for custodial account/mutual fund 403(b) plans, because the Final Treasury Regulations did not change the available sources as it did for 401(k) plans. Lastly, some changes are not optional. Effective 1/1/2020, the suspension of deferrals after a hardship distribution is no longer an option. Our audits will verify that deferrals do not stop automatically after hardship distributions, unless the participant elects to stop deferral withholdings.

Mistakes Happen, but There's a Fix-It Guide for That!

Revenue Procedure 2019-19 – the most current Employee Plans Compliance Resolution System (EPCRS), offers several pre-approved self-correction opportunities for plan operations that go astray, including hardship distribution administration.

EPCRS gives plan sponsors the ability to retroactively amend the plan to match the plan provisions with the plan operations, as long as: (1) the amendment results in an increase of a benefit, right, or feature; (2) the increase applies to all employees eligible to participate in the plan; and (3) providing the increase is permitted under the other requirements of the Code and EPCRS. Nonetheless, ineligible hardship distributions are considered to be overpayments of benefits to participants. Retroactive amendments are not permitted to self-correct overpayments — the plan sponsor must ask the participant to return the money to the plan.

If the participant returns the distribution to the plan, the failure is corrected. However, participants tend to spend dollars connected to ineligible distributions right away, and often cannot return the money. Thankfully, under EPCRS, a plan sponsor does not need to make the plan whole if the failure arose solely because payment of a participant's benefits was made in the absence of a distributable event but was otherwise determined in accordance with the terms of the plan. In this case, requesting the refund seems like it would be a sufficient correction, but we always advise plan sponsors to consult ERISA counsel if they want reassurance that they have properly corrected the operational error. If the participant has terminated employment when the failure is found, the participant would have become eligible for a distribution, and no further correction is needed.

Documentation or Self-Certification Not Obtained — Ideally, the simplest correction possible and available is for the plan sponsor to, *post facto*, get the necessary documentation from the participant, whether it is the hardship reason documentation or the self-certification, as applicable.

More Options, More Opportunity for Error, More Ways to Fix It

Adding self-certification to the hardship distribution substantiation options, made them easier to administer if the employer follows the rules, but also created more ways to get it wrong. Fortunately, the most recent EPCRS offers numerous pre-approved ways to self-correct or to request approval for significant or nonstandard corrections. Whether it comes to preventing, detecting, or correcting operational failures, we can work hand-in-hand with the employer, third-party administrator, recordkeepers, and ERISA attorneys to make everything right. For every mistake, there is always a solution.

Photo By: Stiller Beobachter (https://www.flickr.com/photos/a-herzog/29349253822/in/photolist-LHuADC-dUFLTf-dHihDx-5F52XS-bvpBKU-48NAzF-9qRLWE-qHPs-b21m7v-Kqb33U-eabCVj-27UMG2E-pHSbu-8cXuDG-yN6akn-8nxP38-4gDtmh-gLhqjP-gLgrnp-RPugzz-R7qtvT-2etV8Jf-2fveXGC-6QR4YP-88sMud-xGaitc-iZWVPy-7JW3VM-

Form 5500 Penalties Increased by How Much?

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | November 20, 2020

Posted By Maria Hurd, CPA

The SECURE Act increased IRS Late Filing Penalties for Form 5500 by how much? How can I avoid them?

IRS Penalties

Tenfold. That's how much the SECURE Act (the "Act") increased the penalty for the late filing of a Form 5500 –TENFOLD! Before the Act, the IRS could assess a civil penalty of $25 for each day that the Form 5500 was late up to $15,000, but now, add a zero: the penalty is **$250 per day not to exceed $150,000**. What a difference one zero makes when it is at the end of a number!

IRS Penalty Relief

Thankfully, the IRS waives Form 5500 late filing penalties when the plan sponsor has submitted the late filing through the Department of Labor's Delinquent Filer Voluntary Compliance Program (DFVCP) (https://www.irs.gov/retirement-plans/irs-penalty-relief-for-dol-dfvc-filers-of-late-annual-reports) and also files directly with the IRS any missing Forms 8955-SSA, *Annual Registration Statement Identifying Participants With Deferred Vested Benefits*. However, for Form 5500-EZ or filings that cover only owners, or partners and spouses and, therefore, are not covered by ERISA and the DOL, the IRS has a separate Form 5500-EZ Late Filer Program (https://www.irs.gov/retirement-plans/penalty-relief-program-for-form-5500-ez-late-filers).

Additionally, you can request a waiver of penalties because the late filing was due to reasonable cause and not willful neglect. This waiver is, generally, in the discretion of the IRS.

DOL Penalties

DOL Penalties are determined without regard to any extensions for filing.

DOL Penalties under the DFVCP

- Small Plans – $10/day up to $750/year and $1,500 cap
- Large Plans – $10/day up to $2,000/year and $4,000 cap
- Small Plans of 501(c)(3) organizations – $10/day up to a $750 overall cap

In general, large plans cover 100 participants or more, and small plans cover fewer than 100 participants. Please refer to our blog called "I Don't Want to Grow Up, I Want to be A Small Plan" for more details on the 80-120 rule and the determination of your plan's size.

DOL Penalties outside of the DFVCP

- $50/day up to $18,250/year for a late filing
- $300/day up to $30,000/year for a failure to file

DOL Maximum Penalty

The maximum penalty (https://www.govinfo.gov/content/pkg/FR-2020-01-15/pdf/2020-00486.pdf) for failing to file Form 5500 as adjusted in 2020 increased from $2,194 to $2,233 per day that the filing is late, starting on the unextended due date, which is the last day of the seventh month after year end.

It Doesn't Pay to Run and Hide

Hoping not to get caught is always an option, albeit a bad one. Getting caught means paying $250 per day to the IRS, PLUS either $50, $300 or $2,233 per day to the DOL. The alternative, coming clean, limits the penalty to $10 per day up to a reasonable cap of either $750, $1,500, or $4,000. These penalty possibilities should only lead to one conclusion: join the DFVCP immediately if you have a late or a missed filing. Wishing the problem away is like running if you're on fire. Don't! Stop what you're doing, Drop the lower fee and Roll into the DFVCP program by following the instructions on the DOL Delinquent Filer Voluntary Compliance Program (DFVCP) Penalty Calculator and Online Payment (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/dfvcp)and FAQ about the Delinquent Filer Voluntary Correction Program (https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/dfvcp.pdf).

Shouldn't That Error be Considered Immaterial, even De Minimis?

By Maria T. Hurd, CPA (https://employeebenefitplanaudit.belfint.com/author/mariahurd/) | June 13, 2018

Posted by Maria Hurd, CPA

Disclaimer: All blog posts are valid as of the date published.

When auditors identify operational errors, clients and service providers often ask whether we can ignore them since they are immaterial to the financial statements. It's true that auditors must apply materiality to evaluate the effects of identified misstatements on the audit and the effect of uncorrected misstatements on the financial statements. Although in planning the audit, auditors use tools to quantify a materiality level at which a misstatement will be considered material, they also evaluate the size and the nature of each operational error, and the specific circumstances that caused it, in order to evaluate its effect on the financial statements. When an error is identified, an auditor must evaluate whether the error is an isolated incident, or whether additional participants were affected, and the effect on the financial statements. Often, operational errors found during retirement plan audits are, in fact, immaterial to the financial statements, but they also represent operational errors for which there is a correction suggested in EPCRS. Auditors' recommendations to correct operational errors generally adhere to the EPCRS guidance of what constitutes a de minimis amount and when it is appropriate to make estimates.

Making Participants Whole: Does Materiality Play a Role?

The EPCRS states that: *"In general, a failure must be fully corrected. Although the mere fact that correction is inconvenient or burdensome is not enough to relieve a Plan Sponsor of the need to make full correction, full correction may not be required in certain situations if it is unreasonable or not feasible. Even in these situations, the correction method adopted must be one that does not have significant adverse effects on participants and beneficiaries or the plan, and that does not discriminate significantly in favor of highly compensated employees."*

As such, there are certain permitted exceptions to full correction of plan errors that allow employers to achieve compliance efficiently. For example:

- Corrective distributions of $75 or less
- Distributions for which the costs of delivery are higher than the distribution amount
- Recovery of overpayments to participants of $100 or less
- When computing earnings, corrective allocations MUST include gains and MAY be adjusted for losses.

Note that the exceptions to full correction eliminate the need to take small amounts of money OUT of participant accounts, in the interest of efficiency. However, EPCRS specifically states that this exception does not apply to corrective contributions to participants with accounts under the plan, "*which are required to be made."* If the participant who is owed an omitted contribution is still employed by the company, the IRS would likely prefer that a restitution be deposited, even if an estimate must be made to complete the correction in a cost-effective manner.

Reasonable Estimates

The EPCRS states that*: "If either*

- *it is possible to make a precise calculation but the probable difference between the approximate and the precise restoration of a participant's benefits is insignificant and the administrative cost of determining precise restoration would significantly exceed the probable difference or*
- *it is not possible to make a precise calculation (for example, where it is impossible to provide plan data), reasonable estimates may be used in calculating appropriate correction*.

Examples of Reasonable Estimates

EPCRS provides several specific examples of situations in which estimates are appropriate:

Investment Earnings

"If it is not feasible to make a reasonable estimate of what the actual investment results would have been, a reasonable interest rate may be used. For this purpose, the interest rate used by the Department of Labor's Voluntary Fiduciary Correction Program Online Calculator ("VFCP Online Calculator") is deemed to be a reasonable interest rate. The VFCP Online Calculator can be found on the internet at http://www.dol.gov/ebsa/calculator."

Missed Elective Deferral Deposits

An employer that misses a series of elective deferral deposits into the plan can assume that all missed contributions would have been made on the midpoint of the plan year, or portion of the plan year in which the omission occurred. This method is a practical alternative to computing up to 52 separate interest calculations. In this case, the results of an exact calculation would not be significantly different than those of an estimated contribution date in the midpoint of the omission period.

A Penny Saved is a Penny Earned

Arguably, small and rounding errors that would result in additional contributions of less than a dollar per person could be considered trivial enough to be overlooked. The danger lies in the subjective determination of what's trivial and who makes the call. Most employers would say that a correction amounting to an additional $5 per person is too trivial to complete, but would an employee who contributes $5 per paycheck think the same way? Maybe, maybe not. As everything else in our field that is not black and white, what constitutes an amount so trivial that it is de minimis can be in the eyes of the beholder. Although we strive to be reasonable in our audit recommendations, there is always a chance that a regulator would take the position that a penny saved is a penny earned, so it should be contributed.