ERISA ROUNDUP

A quarterly recap of recent publications from BDO's ERISA Center of Excellence

Q2 2023

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

The summer season is a great time to slow down and focus on your upcoming goals for the second half of the year. To assist in this process, we have assembled a set of our most recent insights along with the latest requirements calendar and access to our recent podcasts and resources in this quarter's issue of the ERISA Roundup.

In this issue of our ERISA Roundup, we discuss how the DOL released the final changes to Form 5500 and how plan sponsors should revisit their operations and ensure policies and filings are current due to the DOL's enforcement activity,

We also explore more information on the option to treat employer contributions as ROTH Contributions under SECURE 2.0 and recommended next steps for plan sponsors if they are interested in offering this feature.

Staying current on ERISA topics is simplified with BDO as we invite you to follow along with our regular insights at our **BDO ERISA Center of Excellence** and our podcast series **BDO Talks ERISA**. We welcome any feedback on our content at **BDOTalksERISA@BDO.com**.

Best,

BETH GARNER
National Practice Leader,
EBP and ERISA Services

BDO's ERISA Center of Excellence is your source for insights on emerging regulations, industry trends, current topics, and more. Visit us at **www.bdo.com/erisa** or follow along on Twitter: @BDO_USA and #BDOERISA.

IN THIS ISSUE

2023 Deadlines and Important Dates

Sponsors of defined benefit and defined contribution retirement plans should keep the following deadlines and other important dates in mind as they work toward ensuring compliance for their plans in 2023. Dates assume a calendar year plan. Some deadlines may not apply, or dates may shift based on the plan sponsor's fiscal year. For additional support, please contact your BDO representative.

JULY

- **14** / **Action:** 401(k) plans with publicly traded employer stock that requested a 15 calendar day extension (SEC Form 12b-25) for the SEC Form 11-K must file the SEC Form 11-K with the Securities and Exchange Commission by July 14.
- **14** / **Fund:** Possible second quarter 2022 contribution due for defined benefit pension plans by July 15 (i.e., contribute by July 14 before the weekend, as contribution deadlines are not extended to the next business day).
- **25** / **Action:** File PBGC Form 200, Notice of Failure to Make Required Contributions, by July 25, if plan sponsor of a single-employer defined benefit plan does not make a July 15 required contribution, causing the plan to have more than $1 million in unpaid contributions
- **31** / **Action:** File IRS Form 5500, Annual Return/Report of Employee Benefit Plan, and IRS Form 8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits, for the 2022 plan year by July 31.
- **31** / **Action:** To request an extension of time to file IRS Form 5500, file IRS Form 5558 by July 31.

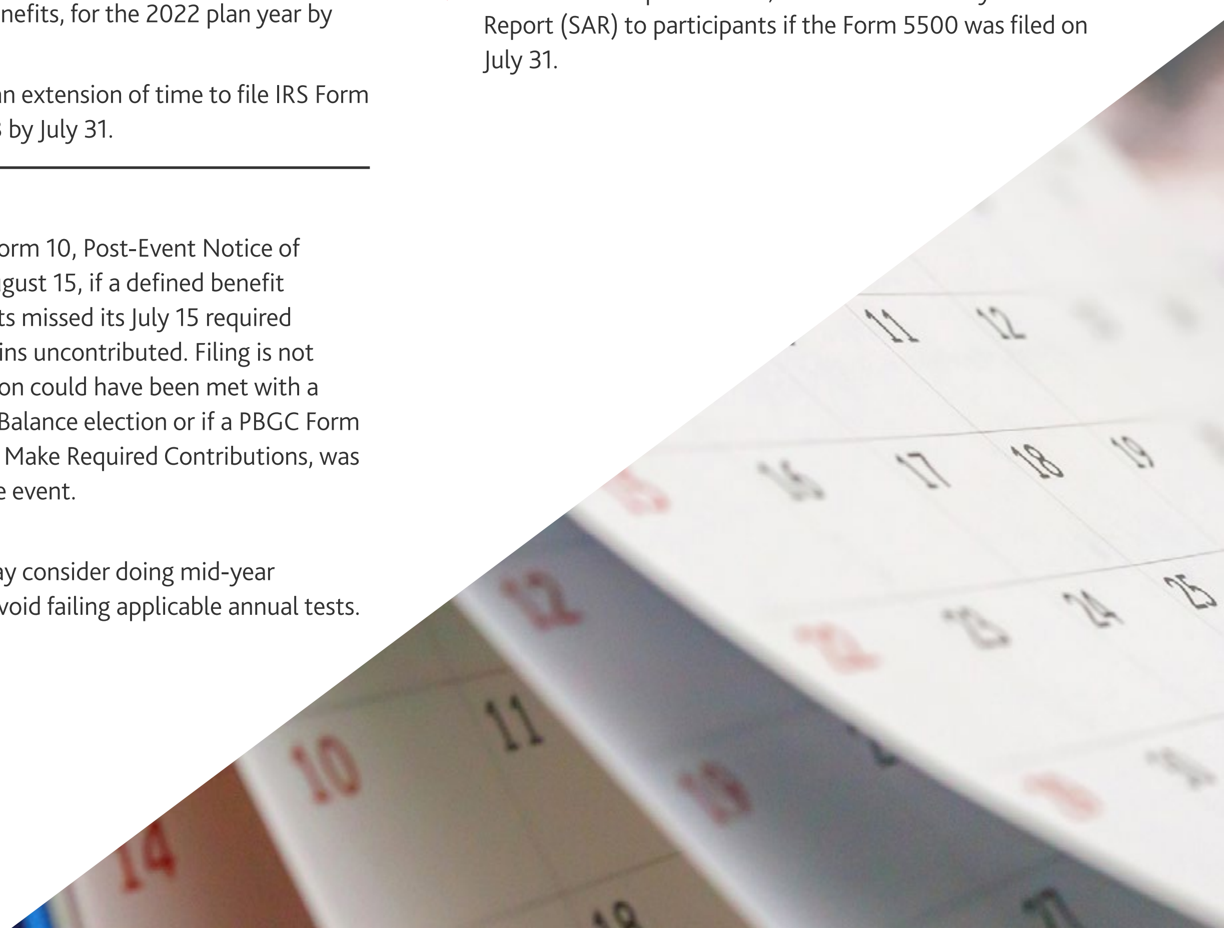
AUGUST

- **15** / **Action:** File PBGC Form 10, Post-Event Notice of Reportable Events, by August 15, if a defined benefit plan with 100 participants missed its July 15 required contribution and it remains uncontributed. Filing is not required if the contribution could have been met with a Prefunding or Carryover Balance election or if a PBGC Form 200, Notice of Failure to Make Required Contributions, was already filed for the same event.

Best Practice: Plans may consider doing mid-year compliance testing to avoid failing applicable annual tests.

SEPTEMBER

- **15** / **Fund:** If an extension was filed, September 15 is the deadline to fund employer contributions for Partnerships and S-Corporations.
- **15** / **Fund:** September 15, last date to make 2022 contributions for single and multiemployer defined benefit pension plans.
- **15** / **Action:** File IRS Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, if plan sponsor of a single-employer defined benefit plan does not make the September 15 required contribution.
- **25** / **Action:** File PBGC Form 200, Notice of Failure to Make Required Contributions, by September 25, if plan sponsor of a single-employer defined benefit plan does not make the September 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **29** / **Action:** September 29, Distribute Summary Annual Report (SAR) to participants if the Form 5500 was filed on July 31.



Stay Up to Date with Our Podcast, **BDO Talks ERISA**

BDO TALKS ERISA

Our ERISA Center of Excellence releases a monthly podcast - BDO Talks ERISA! This series covers best practices around all things ERISA and any other HR-related topics, including:

- How to avoid common compliance issues
- How to navigate the ins-and-outs of ERISA's fiduciary provisions
- Our own experiences working for BDO's ERISA Services group
- A deeper dive into the insights we share through our BDO ERISA Center of Excellence

RECENT EPISODES

Episode 30: SECURE 2.0 & ESOPs

In this episode, Joanne Szupka is joined by Maria Thiel & Blake Head to discuss the world of Employee Stock Ownership Plans (ESOPs) & SECURE 2.0. The discussion focuses on the three provisions in SECURE 2.0 that relate to ESOPs.

LISTEN TO EPISODE 30 NOW

Episode 31: Implications for the 2023 Form 5500 Podcast

In this episode, Joanne Szupka is joined by Nicole Parnell to discuss the changes to the 2023 Form 5500. The discussion focuses on the changes to the methodology for counting participants in defined contribution plans for purposes of determining eligibility for small plan reporting options.

LISTEN TO EPISODE 31 NOW

Episode 32: Podcast with TY

In this episode, co-hosts Beth Garner and Joanne Szupka are joined by TY Parrish - Partner at Cerity Partners and co-author of 401(k) Best Practices A Guidebook for Plan Sponsors. In this podcast, TY discusses the common questions that plan sponsors have and what defines a good advisor and how to navigate in finding an advisor.

LISTEN TO EPISODE 32 NOW

Plan Sponsor Alert: Consider Lump-Sum Payouts Amid Higher Interest Rates

"If you're a defined benefit plan sponsor, you need to be good at juggling," said **SETH PITASKY**, Actuarial Managing Director at BDO.

"Defined benefit plan sponsors are constantly challenged to manage volatility and maintain funding levels to control governmental insurance premiums."

Recently, many defined benefit plan sponsors have opted for various **de-risking strategies**, including buy-outs, buy-ins, and liability-driven investing. Today, there is an increased focus on the segment rates used to determine lump-sum payouts for retiring or terminated participants.

Here we explain segment rates and the impact they have on lump-sum payments. Now is an opportune time to consider lump-sum payouts, as the current high-rate environment may help plan sponsors cash-out participants at a lower cost.

HOW SEGMENT RATES AFFECT LUMP-SUM PAYOUTS

Most traditional defined benefit plans offer two types of payouts: annuities for life or a one-time lump sum. The Internal Revenue Service (IRS) releases monthly **Minimum Present Value Segment Rates**. Plan sponsors identify which IRS segment rates to use for their lump sums by defining a stability period and a lookback period in their plan documents. These rates then are used for lump sums over a set period of time (typically each plan year).

The interest rates set by the IRS are based on the value of corporate bond yields, which have increased considerably over the past year. According to Pitasky, many plan documents determine lump sums for the full 2023 Plan Year using IRS rates between August and December 2022. Those rates increased from 1.8% to as much as 2.8% as compared to the prior year.

Rising interest rates can markedly affect lump-sum payouts in both directions: When rates are low, lump-sum payouts are high and vice versa. In a pension, where expected annuity payouts occur over a long period of time, a change in rates can have a significant effect on lump sum determinations. For example, a 2.5% increase in rates could lower lump sums by 30%–40%.

HIGH INTEREST RATE TRIGGERS

Plan sponsors who have a high interest rate in place for valuing lump-sum payments should be focused on the following:

- **Participant reaction:** Many participants may not be paying attention to the effects of interest rate changes on their pension payout. It isn't unusual for a participant to think their lump sum will not change from statement to statement, so it is important to help them understand the difference between their accrued benefit and other forms of payments, like lump sums.
- **Auto cash-outs:** It isn't uncommon for a plan to have auto cash-out provisions, which allow plan sponsors to cash out participants whose balances fall below $5,000. As a result of the high interest rate environment, many participants' balances may be under this threshold, allowing plan sponsors to cash them out involuntarily.
- **PBGC premiums:** All plans are required to pay insurance premiums based on funding status to the Pension Benefit Guaranty Corporation (PBGC). PBGC premiums have increased to a flat rate of $96 per participant plus a variable rate of $52 for each $1,000 of unfunded vested benefits (capped at $652 per participant). These premiums are significantly higher than ten years ago, when they were $42 per participant plus $9 for each $1,000 of unfunded vested benefits. Plan funding status and premium payments could be reduced significantly as a result of cashing out participants. Volatility in the plan may also be lowered with fewer participants in the plan.
- **Cash balance plans:** It should be noted that interest rate fluctuations do not affect many cash balance plans as significantly. Cash balance plans act like 401(k)s, so the amount in each account is the actual payout.

BDO INSIGHT: TIME TO TERMINATE YOUR PLAN?

Many factors play into the decision to terminate a plan. Even though lump sums may have decreased, plan assets may have also decreased, which could affect the ability of a plan to afford a termination. In addition, the process to terminate may take a year or more, so the rates used to calculate lump-sum payments in 2024 may not be what the plan applies in 2023. Therefore, higher payouts may result. Finally, even though participants can be offered lump sums in a plan termination, they always must be offered annuity payments from an insurance company, which usually come at higher costs to the plan when compared to lump sums.

One way to shore up a plan's volatility and remain active is to review the plan documents and see how the lump sum cash-out rate may help. While annuities may be a good option, plan sponsors will need to pay a premium for insurers to take on participant pension liabilities. In a high interest rate environment, lump sums could reduce the number of participants in the plan with payouts that are lower than what was previously expected.

Your BDO representative is available to help analyze your specific conditions to determine whether lump-sum payouts can help ease volatility in your defined benefit pension plan.

Plan Sponsor Alert: DOL Enforcement Activity Expected to Increase in 2023

In 2022, the Employee Benefits Security Administration (EBSA) saw a significant decrease in enforcement actions for the second consecutive year. In total, the EBSA recovered $1.4 billion for plans, participants, and beneficiaries in 2022—down from $2.4 billion in 2021 and $3.1 billion in 2020. This decline in enforcement activity may be attributed to the Department of Labor's (DOL) **Notice 2020-01**, which relieved employers from enforcement actions if they made a good faith effort to comply with rules during the height of the COVID-19 pandemic. But now that the Biden administration plans to end the Covid-19 national emergency and public health emergency, enforcement activity is expected to increase.

With greater enforcement action likely on the horizon, plan sponsors should review the EBSA's focus areas for enforcement and ensure their plans are compliant with current rules and regulations. In this article, we review recent enforcement activity and highlight areas that plan sponsors should be watching carefully.

DOL REMOVES BAD ACTORS AND HELPS MISSING PARTICIPANTS IN 2022

In 2022, the **EBSA reported** it closed 907 civil investigations, getting money back in participants' hands in 66 percent of these cases. In addition, the EBSA produced 402 non-monetary civil corrections, which included removing 29 fiduciaries (up from six in 2021), appointing 30 fiduciaries, banning 35 people from becoming fiduciaries, and improving missing participant procedures for 50 plans. This activity shows that although the EBSA relaxed its attention on monetary recoveries, it was vigilant in removing bad actors and improving processes in 2022.

Overall, the EBSA enforcement program is broken into four areas:

- Recoveries from Enforcement Actions ($931 million recovered in 2022)
- Voluntary Fiduciary Correction Program ($8 million recovered in 2022)
- Abandoned Plan Program ($84 million recovered in 2022)
- Monetary Benefit Recoveries from Informal Complaint Resolution ($422 million recovered in 2022)

Over the past several years, the majority of recoveries came from helping to collect benefits for terminated vested or missing participants in defined benefit plans. While only $542 million was recovered for such participants in 2022 — compared to $1.5 billion recovered in 2021 — the results clearly show the DOL's continued interest in its missing participants program.

Regardless of whether you manage a defined benefit or defined contribution plan, plan sponsors with missing participants should carefully review the DOL's "**Missing Participants – Best Practices for Pension Plans**." The memo lists a number of warning signs for missing participant issues and includes examples of best practices, including:

- Maintaining accurate census information
- Creating effective communication strategies
- Searching for missing participants
- Documenting procedures and actions

In addition, the SECURE 2.0 Act passed in 2022 instructed the DOL to create a lost and found database so missing participants can find contact information for their plans.

WHAT CAN PLAN SPONSORS DO TO LIMIT THE RISK OF ENFORCEMENT ATTENTION?

In 2019, we wrote about the DOL's **enforcement focus areas**—and that list still holds true today. Late deposits, self-dealing transactions, and improper payments or compensation will certainly pique investigators' interest.

One of the DOL's newer focus areas is cybersecurity. In 2021, we **covered** the DOL's informal **guidance on cybersecurity**, which used three separate documents to outline best practices for hiring a service provider, implementing a cybersecurity program, and giving users online security tips.

In its section for hiring a service provider, the DOL said plan fiduciaries should use an outside auditor to review and validate a vendor's cybersecurity practices and determine whether the vendor carries insurance to cover losses caused by a breach. These and other suggestions should be seen as recommendations and not formal regulations, but plan sponsors would be wise to develop and document their processes when evaluating a potential service provider's cybersecurity practices.

BDO INSIGHT: PREPARE FOR MORE ENFORCEMENT ACTIVITY

Notice 2020-01 stipulated that its guidance would be effective from March 1, 2020, until 60 days after the announcement of the end of the Covid-19 National Emergency. This means that starting in the summer of 2023, grace periods and other relief efforts will no longer be available to plan sponsors.

Many plan sponsors may have taken advantage of the DOL's recent pause in enforcement. But now that the DOL's enforcement activity is expected to return to more typical levels, plan sponsors should revisit their operations and ensure policies and filings are current.

BDO has seen many incidents that have attracted enforcement actions in the past, including late deposits, missing audits on Form 5500s, and late Form 5500 filings. The DOL has recently increased its **penalties for violations** like these, including a daily fine of $2,586 for failing to file a Form 5500 (up from $2,400 last year).

If you are interested in learning more about compliance requirements and how to avoid a DOL investigation, your BDO representative is able to help.

Plan Sponsor Alert: Changes to the 2023 Form 5500

The Department of Labor (DOL) released the final changes to Form 5500 relating to the September 2021 notice of proposed form revisions (NPFR) to amend the Form 5500. The changes fall into seven major categories. These changes are effective for plan years beginning on or after January 1, 2023 and will be incorporated into the 2023 Form 5500.

As a reminder, the Form 5500 provides the DOL, Internal Revenue Service and the Pension Benefit Guaranty Corporation with information about a retirement plan's operations, qualifications, financial condition, and compliance with government regulations.

Below, BDO reviews some of the key changes to Form 5500 and what the adjustments are.

ARE YOU A LARGE PLAN OR A SMALL PLAN? THE RULES HAVE CHANGED

Historically, determining whether your plan was "large" versus "small" was based on the number of eligible participants in your plan. If your plan had at least 100 eligible participants on the first day of the plan year, you were considered a large plan—regardless of how many participants had accounts or elected to participate in the plan.

The DOL's recent changes to Form 5500 redefine large plans by the number of participants with account balances on the first day of the plan year. If your plan has at least 100 participants with active accounts, then you are a large plan, and an annual audit is required. (Note that this provision only applies to defined contribution plans and is in effect for plan years that begin on or after January 1, 2023.)

This provision will significantly change the threshold for the status of large versus small plans. The DOL estimates 19,500 large plans will no longer be subject to the annual audit requirement relating to this participant-count methodology change.

While this change is likely good news for many plan sponsors, there are some potential issues. For example, a failed compliance test or the allocation of forfeitures could push plans over the 100-participant threshold. If a plan fails the Actual Deferral Percentage or the Actual Contribution Percentage test, participants who closed out their accounts may need to be reinstated for reimbursement purposes. To avoid this issue, plan sponsors should carefully review their plan documents to determine whether they are able to "push out" participants with account balances under $5,000.

MORE UPDATES COMING DOWN THE PIKE

The DOL's final changes includes several other changes. Mock-ups of the new forms and instructions for the following items will be available later this year at **Reginfo.gov**:

- Consolidated Form 5500 for Defined Contribution Groups
- Streamlined reporting on the 5500 for pooled employer plans and multiple-employer plans
- New breakout categories for administrative expenses (Schedule H)
- Revisions to the financial and funding reporting requirements for defined benefit plans
- New Internal Revenue Code (IRC) compliance questions to improve tax oversight

Certain revisions from the NPFR have been delayed including proposed revisions to the content requirements for the schedules of assets filed by large plans. The DOL wants to modernize data reported in a plan's individual investments to improve consistency, transparency, and usability of plan investment information, but feedback revealed that service providers need more time.

BDO INSIGHT: PARTNER WITH SERVICE PROVIDERS TO BUILD YOUR STRATEGY

Most plan sponsors process distributions with the help of service providers, so it is important to partner with such service providers to keep an eye on your number of participants—especially if you are close to the threshold of 100 active plan participants. Plan sponsors should clarify if it is their goal to remain a small plan, familiarize themselves with the options presented in the plan document to move participants out of the plan, and determine the procedure for a potential distribution.

Your BDO representative is available to discuss the changes to Form 5500.

Plan Sponsor Alert: Option to Treat Employer Contributions as Roth Contributions Under SECURE 2.0

Of the many provisions within the SECURE 2.0 Act, there is one that plan sponsors may want to pay particular attention to: the option to allow employees to elect to treat employer contributions as Roth contributions. We expect this provision will attract employees' attention because it expands the retirement toolkit for plan participants. But there are important issues to navigate as the dust from the recently passed legislation settles.

"Plan sponsors should review this provision as soon as possible, because we expect strong interest from plan participants," said **NICOLE PARNELL** of BDO's Global Employer Services team.

"But before they start implementing these provisions, plan sponsors should know that many details need further regulatory guidance, and this feature will require additional education for participants."

Here, BDO shares more information about this change and recommended next steps for plan sponsors if they are interested in offering this feature.

WHAT DO PLAN SPONSORS NEED TO KNOW ABOUT THIS CHANGE?

Prior to the SECURE 2.0 Act — which was part of the Consolidated Appropriations Act of 2023 that was signed into law on December 29, 2022 — employer contributions made to 401(k), 403(b), or 457(b) plan accounts were only allowable on a pretax basis; such contributions couldn't be classified as after-tax Roth. Effective December 29, 2022, employers can allow employees to elect to have their matching or non-elective contributions made on an after-tax Roth basis.

This feature is optional, and employers will need to amend their plan documents to provide it. The earliest that plans adopting this change will need to be amended is the last day of the first plan year beginning on or after Jan. 1, 2025. In addition, while employers are permitted to adopt this feature immediately, it may not be operationally feasible to do so because of potential issues with tracking and reporting employee elections (more on this below) as well as depositing into the appropriate sources in the plan accounts.

Employees will need to be 100% vested in their employer matching or non-elective contributions to take advantage of the Roth option. Employees must formally elect for the employer contribution to be Roth and will need to pay taxes on such contributions. Plan sponsors will still be able deduct these employer contributions just like other pretax-based employer contributions.

IMPORTANT QUESTIONS ON REPORTING AND TRACKING

While participants will need to formally elect Roth employer contributions, it is unclear how the action will be documented in plan records as well as reported to both service providers and applicable government agencies. It seems logical that this process would be similar to a deferral election, in which case recordkeepers would track Roth contributions. But most service providers do not yet know how their recordkeeping systems will be updated to accept and track such Roth contributions. Service providers must invest time and money to establish the required functionality, and it seems that they may want to give the Internal Revenue Service (IRS) time to issue guidance before making the required updates to their technology and operations.

Other issues that must be clarified by the IRS include whether to report the taxes owed on the newly designated Roth employer contributions on Form 1099-R (which would only capture income taxes) or Form W-2 (which would capture both income and employment taxes), the creation of Roth election forms, and whether this election will be made annually. Thus, the potential rollout of this plan feature may be stalled until the IRS provides guidance and service providers update their recordkeeping and tax reporting systems.

WHAT SHOULD PLAN SPONSORS DO NOW?

Plan sponsors interested in offering this new option to participants should speak with their service providers as soon as possible to determine how this feature may work for their organization. Service providers may move more quickly to establish the required systems and processes if enough plan sponsors proactively ask for this feature.

Although employers don't need to immediately amend their plans to allow for this feature, plan sponsors that are interested in offering it should carefully document their process so all of the proper provisions are covered when it is time to prepare the amendment.

Plan sponsors should also keep in mind that participants may not be fully aware of the tax implications of moving to a Roth matching or non-elective contribution. Employers should prepare to educate participants on the tax implications — including that Roth employer contributions will be included in a participant's gross income and will therefore be taxed at regular taxable wage withholding rates. Participants should understand that a significant contribution may even push them into a higher tax bracket. It is always a best practice for plan participants to discuss their retirement planning and elections with a tax advisor to ensure it fits their needs and tax position in the best way.

BDO INSIGHT: COMPARE YOUR OPTIONS CAREFULLY

Even before the passage of SECURE 2.0, plan sponsors offering Roth deferrals could allow participants to do an in-plan conversion of monies from a Pretax 401(k) or 403(b) to a Roth account.

So, is it better for plan sponsors to keep the Roth conversion provision in place, move to the new SECURE 2.0 feature, or allow for both? Some organizations may want to offer Roth conversions in certain plans and the new Roth feature in others — plan sponsors need to understand both approaches before determining the best path forward.

In the end, the answer likely should rely on a side-by-side comparison of actual situations affecting your organization.

Your BDO representative is available to help you understand the new Roth employer contribution rules and which plan features may be best for your organization.

Have Questions? Contact Us ▶

IRS Drastically Expands Electronic Filing Requirement for 2023 Tax and Information Returns

The Internal Revenue Service **finalized regulations** on February 23, 2023, significantly expanding mandatory electronic filing of tax and information returns that require almost all returns filed on or after January 1, 2024, to be submitted to the IRS electronically instead of on paper.

Under the new rules, filers of 10 or more returns of any type of for a calendar year generally will need to file electronically with the IRS. Previously, electronic filing was required if the filing was more than 250 returns of the same type for a calendar year.

The discussion below focuses primarily on common workplace IRS information forms, such as Form W-2 and 1099 filings and employee benefit plan filings, but the new rules broadly apply to other types of returns.

BDO INSIGHTS

Affected employers may need significant lead time to implement new software, policies and procedures to comply with the new rules. Thus, even though electronic filing is not required until 2024 for the 2023 tax year, employers should evaluate what changes may be needed. Simply doing the "same as last year" will not work for many employers.

GENERAL RULES

Who is affected?

Practically all filers with the IRS of 10 or more information returns when counting any type, such as Forms W-2, Forms 1099, Affordable Care Act Forms 1094 and 1095 and Form 3921 (for incentive stock options) and other disclosure documents, are impacted by this change this year – that is, for 2023 returns that will be filed in 2024. Even workplace retirement plans may need to file Form 1099-Rs (for benefit payments) and other forms electronically with the IRS starting in 2024, for the 2023 plan or calendar year.

Which returns are affected?

In addition to the information returns that are the primary focus of this article, the new rules cover a broad variety of returns, including partnership returns, corporate income tax returns, unrelated business income tax returns, withholding tax returns for U.S.-source income of foreign persons, registration statements, disclosure statements, notifications, actuarial reports and certain excise tax returns.

The rules are not relaxed under these regulations. Thus, returns that are already required to be filed electronically, including partnership returns with more than 100 partners, tax-exempt organization annual returns in the Form 990 series, Form 4720 (for certain excise taxes) and most Forms 5500 (Annual Return/Report of Employee Benefit Plan) continue to be subject to the electronic filing requirement. However, under the new regulations, any taxpayer with 10 or more returns, including income and information returns, must also file its income tax return electronically.

How to count to 10?

A significant change introduced by the new regulations is that the 10-return threshold for mandatory electronic filing is determined on the aggregate number of different types of forms and returns. The aggregation rules are confusing because the filings included in the count change depending on which form the determination is made. Also, some filers must be aggregated with all entities within its controlled or affiliated service group to determine if 10 or more returns are being filed for the tax year. For instance, Form 5500 employee benefit plan filers (but not Form 8955-SSA employee benefit plan filers) must count the filings of the employer who is the "plan sponsor" and other entities in the employer's controlled and affiliated service group.

Example 1: Company A is required to file five Forms 1099-INT (Interest Income) and five Forms 1099-DIV (Dividends and Distributions), for a total of 10 information returns. Because Company A is required to file a total of 10 information returns, Company A must file all of its 2023 Forms 1099-INT and 1099-DIV electronically, as well as any other return(s) that are subject to an electronic filing requirement. The reason for this result is that "specified information returns" such as Forms 1099 and W-2 must be aggregated when counting to determine whether the new 10-or-more threshold for electronic filing is met.

Example 2: Company B is required to file nine Forms W-2 and one Form 8955-SSA. Company B is not required to file the Forms W-2 electronically because the aggregation rules for "specified information returns" take into account only other specified information returns that do not include Form 8955-SSA nor the income tax return. But Company B must file the Form 8955-SSA electronically because the aggregation rules for Form 8955-SSA takes all returns into account.

Example 3: Corporation X, a C corporation with a fiscal year end of September 30, was required to file one Form 1120 (U.S. Corporation Income Tax Return) during the calendar year ending December 31, 2023, six Forms W-2 (for employees), three Forms 1099-DIV (for dividend distributions), one Form 940 (Employer's Annual FUTA Tax Return) and four Forms 941 (Employer's Quarterly Federal Tax Return). Because the Form 1120 aggregation rules include returns of any type during the calendar year that ends with or in the taxable year and Corporation X is required to file more than 10 returns of any type during calendar year 2023, Corporation X is required to file its Form 1120 electronically for its taxable year ending September 30, 2024.

BDO INSIGHTS

Any payers that currently file any returns on paper should consult with their tax advisor to determine if the new electronic filing requirements apply to them based on the number of returns that they anticipate filing in 2024 for tax year 2023.

Filers must, for the first time, pay particular attention to the total number of returns across all return types, because the new electronic filing threshold is determined based on the aggregate total, not the number of returns per return type. This might require coordination between different departments within an organization and immediate consultation with the IT department and/or software provider to ensure there is adequate time to implement technology solutions or software upgrades before the 2024 filing deadline.

The IRS's new -- and free -- online portal for filing these returns electronically, Information Returns Intake System (IRIS), is especially helpful for small filers dealing with electronic filing for the first time. According to the IRS, IRIS is secure, accurate and does not require any special software. This free service is available to filers of any size.

RETIREMENT AND EMPLOYEE BENEFIT PLANS

How do the new rules apply to retirement and benefit plan filings?

Different aggregation rules apply, depending on the type of form being tested for whether electronic filing is required, which can be confusing.

Form 5500

Filers of Form 5500 must file electronically for plan years that begin on or after January 1, 2024, if they (together with any member of a controlled or affiliated service group) are required to file at least 10 returns of any type, including information returns (such as Forms W-2 and Forms 1099), income tax returns, employment tax returns and excise tax returns, during the calendar year that includes the first day of the plan year. Thus, Form 5500 filers are subject to an additional controlled group aggregation rule that does not apply to other types of filings. This means that Form 5500-EZ (plans that cover only the owner or owner and spouse) may need to be filed electronically depending on the number of Forms W-2, Forms 1099, etc. filed by the plan sponsor and affiliated businesses. Most Forms 5500s (but not Form 5500-EZ) are already filed electronically through the U.S. Department of Labor's EFAST2 filing system.

Form 8955-SSA

Forms 8955-SSA (identifying retirement plan participants who terminated employment but left vested benefits in the plan) that are required to be filed for plan years that begin on or after January 1, 2024, must be electronically filed if the filer is required to file 10 or more returns of any type, including information returns (such as Forms W-2 and Forms 1099), income tax returns, employment tax returns and excise tax returns, during the calendar year that includes the first day of the plan year. But if the Form 8955-SSA filer is a member of a controlled or affiliated service group, the filer would count only the number of its own returns being filed and would not count the number of returns being filed by others in the group.

Form 5330

Forms 5330 (for certain employee benefit plan excise taxes) required to be filed for tax years ending on or after December 31, 2023, must be filed electronically if the filer is required to file 10 or more returns of any type, including information returns (such as Forms W-2 and Forms 1099), income tax returns, employment tax returns and excise tax returns, during the calendar year in which the Form 5330 is due.

Forms 1094, 1095, 1099 and 5498

Forms 1094 and 1095 series (Affordable Care Act coverage reporting), Form 1099 series (including 1099-R for retirement plan benefit payments) and Form 5498 Series (for IRA contributions) required to be filed after December 31, 2023, must be filed electronically if the filer is required to file 10 or more "specified information returns" during the calendar year that includes the first day of the plan year.

Counting Rules for Each Form

When determining whether a filer for a retirement plan's Forms 1099-R must file those forms electronically, the filer would count only its "specified information returns" (like Forms W-2, 1099 series, 1094 series, and 1095 series). The requirement to include filings by entities in the sponsor's controlled or affiliated group applies only to electronic filing of the plan's Form 5500.

Example 1: If a retirement plan filer is required to file eight Forms 1099-R, one Form 5500 and one Form 8955-SSA, the filer is not required to file the Forms 1099-R electronically. However, it is required to file Forms 5500 and 8955-SSA electronically, because all returns, including Forms 1099-R, must be taken into account for determining Forms 5500 and 8955-SSA electronic filing status under the aggregation rules.

Example 2: In 2023, Company A (the plan sponsor and plan administrator of Retirement Plan B) is required to file a 2023 Form 5330 for its nondeductible contribution to Plan B. Company A and Plan B both operate on a calendar-year basis. In 2024, Company A (as plan administrator) is required to file 21 returns for 2023, including nine 2023 Forms 1099-R (for plan benefit payments), 10 2023 Forms W-2, one 2023 Form 5500 and one 2023 Form 1120 (federal corporate income tax return). Because Company A is required to file at least 10 returns of any type during the 2024 calendar year, Company A must file the 2023 Form 5330 for Plan B electronically.

Example 3: Assume plan sponsor A, who maintains retirement plan B, is required to file one Form 1099-R, one Form 5500 and one Form 8955-SSA. Assume plan sponsor A is not a partnership with 100 or more partners, and is required to file one Form W-2, four Forms 941, one Form 940, and one Form 1120 (federal corporate income tax return). Assume also that plan sponsor A owns 100% of entity C, which files 20 Forms W-2, four Forms 941, one Form 940 and one federal income tax return. The Form 1099-R for the plan and the Form 8955-SSA can be filed on paper (because the controlled and affiliated service group rules do not apply to those filings), but the Form 5500 for the plan must be electronically filed due to the aggregation rules.

What about corrected returns?

Generally, if an original return is required to be filed electronically, any corrected return corresponding to that original return must also be filed electronically. If an original return is permitted to be filed on paper and is filed on paper, any corrected return corresponding to that original return must be filed on paper.

Are there any waivers or exemptions?

Filers that are required to file fewer than 10 returns during the calendar year when counting all types may use IRS paper forms, but only if the paper form is machine-readable.

In cases of undue hardship, the IRS may waive the mandatory electronic filing requirement. The main factor in determining hardship is the amount, if any, by which the cost of electronic filing exceeds the cost of paper filing. Religious waivers will also be considered. Waiver requests must be made in accordance with applicable IRS revenue procedures and must specify the type of filing and the period to which it applies. Electronic filing is also generally waived if the IRS's system does not support it for a particular form or situation.

Example: If an employer is required to file a final return on Form 941 (Employer's Quarterly Federal Tax Return), or a variation thereof, and expedited filing of Forms W–2 (or applicable versions for Puerto Rico, the U.S. Virgin Islands, Guam or American Samoa) is required, but the IRS's systems do not support electronic filing, filers will not be required to file electronically.

What are the penalties for noncompliance?

A failure to file in the required manner (for example, electronically or on machine-readable paper forms) is considered a failure to file. The penalties differ based on the type of return. For information returns, such as Forms W-2 and Form 1099 series, the penalty under Internal Revenue Code Section 6721 would apply, which is up to $310 per information return (for 2023 information returns required to be filed in 2024) with an annual maximum penalty of $3,783,000 ($1,891,500 for small businesses with annual gross receipts of no more than $5 million). Penalty amounts are indexed and change annually.

When are the new rules effective?

The new mandate is generally effective for 2023 tax year returns that must be filed with the IRS on or after January 1, 2024.

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Even if filers are not required to file electronically under the new rules, they may want to consider doing so, as electronic filing has become more common, accessible and economical. Electronic filing may reduce administrative efforts compared to paper filing, can increase accuracy and improve record retention.

The new mandatory electronic filing rules are complicated and penalty exposure may be significant. BDO can help employers understand and comply with the new rules, which could include facilitating electronic filing.

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