employee benefits update

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IRS eases pain for correcting certain plan administration errors

To err is human; to forgive is divine, according to poet Alexander Pope. The IRS acknowledges that retirement plan administrators aren't infallible, and provides correction for certain administrative errors. Most recently, it reduced certain penalties and extended deadlines for fixing specified mistakes.

Some background

In 2013, the IRS overhauled the Employee Plans Compliance Resolution System (EPCRS). One of the more significant changes involved benefit overpayment. If a plan inadvertently gives participants more than they're entitled to, the plan must recover those dollars. Plans can do this by having affected participants repay the excess, or, with a defined benefit plan, by adjusting the accrual rate for future benefits.

However, for many years before this change, the U.S. Department of Labor (DOL) recognized the need for discretionary exceptions when reclaiming excess benefits. For example, it made an exception when recovering the overpayment would cause financial hardship for aged participants and beneficiaries, particularly when the error was discovered long after it was made.

IRS and DOL agree

After the 2013 update to the EPCRS, it wasn't clear whether the IRS agreed with the DOL's position. As a result, when confronted with such a situation, many plans followed the IRS stance and required repayment.

The 2015 EPCRS updates reduced penalty amounts for certain errors, based on plan size.

But in 2015 the IRS went on record as accepting the DOL position. Thus, "depending on the facts and circumstances," plans may not have to recover overpaid funds. An example offered by the IRS is when plan sponsors or third party administrators contribute the amount of excess funds to the plan from their own resources. The IRS also is accepting suggestions for examples of reasonable circumstances when it shouldn't require recoupment.

Plan amendments and determination letters

The IRS also reminded plan sponsors that, if they need to amend their plans to address excess benefit payments, they can't opt to "self-correct" under its correction program. Plan sponsors must have

Penalty modified for failing to process participant 401(k) plan deferrals

Until recently, the penalty associated with a plan's failure to start deducting and investing 401(k) plan participants' elective deferral amounts and any accompanying employer matches equaled 50% of those amounts. The IRS has changed that policy.

According to IRS Revenue Procedure 2015-28, that penalty now will no longer apply if certain conditions are met. What are those conditions? First, the correct deferral amounts begin the earlier of the first payday on or after the last day of the 9½ month period after the end of the first plan year in which the failure began — or, if the plan sponsor was notified of the failure by the affected eligible employee, the first payday on or after the last day of the month after the month of notification.

In addition, sponsors must notify affected employees of the error no later than 45 days after the date the correct deferrals begin. Finally, the plan must make corrective contributions for any matching contributions — and earnings on those contributions — the employee otherwise would have received.

the IRS approve such an amendment in advance by applying for an IRS determination letter seeking approval of the plan amendment needed to cure the problem.

However, other administrative errors may not require a determination letter. Under the new procedures, a determination letter isn't required if an amendment made to a preapproved plan isn't so substantial that it prevents the plan from being able to rely on the preapproved plan's advisory or opinion letter.

If a plan sponsor must apply for a determination letter (along with a correction filing) to approve a plan amendment fixing a problem, the sponsor now has the later of 150 days after the compliance statement, or 91 days after the issuance of a favorable determination letter, to adopt the corrective amendment. This doesn't apply, however, in cases where the plan has failed to adopt a change in the law.

Penalties reduced

The 2015 EPCRS updates also reduced penalty amounts for certain errors, based on plan size. The previous policy caused some larger plans to think twice about coming clean on small mistakes that could perhaps be swept under the rug and quietly fixed. Now plans with up to 150 participants face a maximum penalty of $500 for errors involving required minimum distributions, whereas, before, the cut-off point was 50 participants.

One last change

Defined contribution (DC) plans featuring only elective deferrals and nonelective employer contributions previously had 2½ months following the plan year to remedy excess DC plan annual additions. The IRS extended this deadline to nine months. However, this isn't applicable to DC plans that make matching contributions. Talk to your benefits advisor to learn more about how the reduced penalties and extended deadlines may affect your plan.

Upcoming compliance deadlines:

3/1 Deadline for filing paper 2015 Form 1099 with IRS (electronic filing deadline is March 31)

3/15 Deadline for making corrective distribution for failed 2015 actual deferral percentage (ADP) / actual contribution percentage (ACP) tests without 10% excise tax penalty

3/15 Deadline for filing 2015 corporate tax return and making contributions eligible for deductibility without extension

4/1 Deadline for taking first required minimum distribution for participants attaining age 70½ or retiring after age 70½ in prior year

4/15 Deadline for corrective distribution of 2015 402(g) excess deferral failures

4/15 Deadline for filing 2015 individual and/or partnership tax returns and making contributions eligible for deductibility

What are you forgetting?

REVIEWING COMMONLY OVERLOOKED FIDUCIARY DUTIES

Although retirement plan fiduciaries take their jobs seriously, it can be hard to cover all the bases. That's understandable, considering the broad scope of fiduciary responsibility as well as the dynamic nature of the retirement plan designs, investment management and legal interpretations of fiduciary duty. Some common pitfalls include failing to identify the plan's fiduciaries, insufficiently training fiduciaries and spending too much time on inappropriate investments.

Knowing your fiduciaries

Do you know the identities of all your plan fiduciaries? Fiduciaries should know who else carries the responsibilities. Having fiduciary status — and the liability associated with the role — is a powerful motivator to pay careful attention to the management of the retirement plan. However, the scope of your fiduciary duty varies according to the role taken. Let's take a closer look at the types of plan fiduciaries:

Named fiduciaries. ERISA requires the existence of named fiduciaries. The plan document identifies the corporate entity or individual serving as the named fiduciary. If they aren't immediately identified, the plan document will set the requirements for naming them. The named fiduciary can designate and give instructions to plan trustees.

Plan trustees. These are people who have exclusive authority and discretion to manage and control the plan assets. The trustee can be subject to the direction of a named fiduciary. These plan fiduciaries have a broad scope of responsibility.

Board of directors and committee members. ERISA considers individuals — typically the corporate board of directors, who choose plan trustees and administrative committee members — fiduciaries. The scope of their fiduciary duty focuses on how they fulfill that specific function, and not on everything that happens with the plan itself. The law also sees as fiduciaries people who exercise discretion in key decisions about plan administration, including members of an administrative committee, if such a committee exists.

Investment advisors. The named fiduciary can appoint one or more investment managers for the plan's assets. People or firms who manage plan assets are plan fiduciaries. However, individuals employed by third party service providers can fall into different fiduciary categories. The investment manager who has complete discretion over plan asset investments (known as an ERISA 3(38) fiduciary) has the greatest fiduciary responsibility.

In contrast, a corporation or individual who offers investment advice, but doesn't actually call the shots (an ERISA 3(21) fiduciary), has a lesser fiduciary responsibility. The advice can be about investments or the selection of the investment manager.

Service providers. If you use service providers, be sure the service agreement clearly specifies when a service provider is acting in a fiduciary capacity.

Anyone who exercises discretionary authority over any vital facet of plan operations falls under a catch-all category of a "functional fiduciary."

Training your fiduciaries

Given the crucial role fiduciaries play, they must be properly trained for the role. This is a step that's often neglected and can be of particular concern for company employees who don't have full-time jobs related to running the plan.

Failing to properly train fiduciaries to carry out their roles may represent a fiduciary breach on the part of the other fiduciaries responsible for selecting them.

The U.S. Department of Labor is known to focus on this when it reviews a plan's operations. Also, have named fiduciaries (such as individually named trustees or members of plan committees) accept in writing their role as a fiduciary.

Providing proper insurance

A sometimes overlooked task includes properly protecting your plan's fiduciaries against costly litigation and penalties with insurance designed for this purpose. Companies generally cover fiduciaries who also serve as corporate directors or officers through directors and officers or employment practices insurance policies. These generally don't extend to fiduciary breaches.

And remember, ERISA fidelity bonds protect the plan's assets from theft or fraud, not from fiduciary breaches. ERISA requires a fidelity bond, but not fiduciary liability insurance. However, given that anyone who is a fiduciary is *personally* liable for any violation of their fiduciary duties, you should have fiduciary liability coverage, often called an ERISA rider.

Focusing on the wrong investments

Stock market volatility and speculation about changes in Federal Reserve policies (and their resulting financial market impact) can lead plan fiduciaries to rely on retirement fund investment alternatives that focus on narrow sectors and strategies. This can divert fiduciaries' attention from the investment options where most of their participants are parking the majority of their retirement savings: stable value and target date funds (TDFs).

Neglecting the big picture

Ultimately, retirement plans should prepare employees for retirement. How well that's accomplished is often referred to as participant "outcomes." Fiduciaries with broad responsibility for plans that ignore the big picture ultimately are failing participants, and possibly making themselves vulnerable to a charge of neglecting their fiduciary duties. Reviewing the common mistakes regularly can help you avoid making them.

It may be time to offer annuity options to 401(k) plan participants

In theory, allowing 401(k) plan participants to convert their accumulated retirement savings into a lifetime income stream through an annuity contract sounds like a win. After all, it allows participants to basically turn their 401(k) plan into a pension, so that they have a predictable income stream during their lifetime. So why haven't annuities been used more?

A little history

The U.S. Department of Labor (DOL) originally created a safe harbor rule in 2008 regarding the selection of annuity providers, but sponsors didn't use it to incorporate more annuity options into 401(k) plans. For most plan sponsors, worries about fiduciary liability associated with selecting an annuity provider have stood in the way.

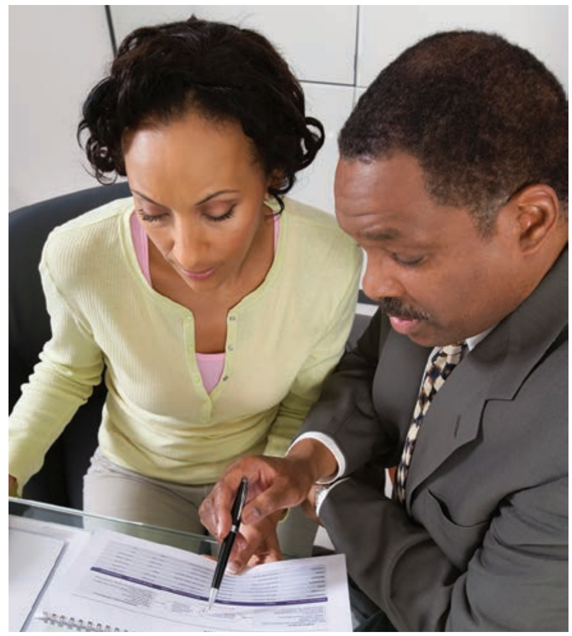
The sponsor's obligation to monitor an annuity provider ends when the sponsor stops offering that provider's products.

A DOL "field assistance bulletin" (FAB) issued last year may turn the tide. The FAB clarifies the fiduciary standard for selecting annuity providers.

A safety net

The current annuity selection safe harbor includes five elements and is met if the plan's fiduciary:

1. Engages in an objective, thorough and analytical search to identify and select providers from which to purchase annuities,
2. Considers information sufficient to assess the annuity provider's ability to make all future payments under the annuity contract,



3. Considers the cost (including fees and commissions) of the annuity contract in relation to the provided benefits and administrative services,
4. Concludes that, at the *time of the selection*, the annuity provider is financially able to make all future payments under the annuity contract, and
5. Consults with a professional to comply with these provisions if necessary.

According to the FAB, "at the time of selection" means that the DOL will evaluate the prudence of a fiduciary decision using the information available at the time the decision was made. It doesn't consider facts that may come to light at a later date.

In addition, the sponsor's obligation to monitor an annuity provider ends when the sponsor stops offering that provider's products. Thus, if a sponsor stops offering an annuity, the sponsor isn't subject to fiduciary liability if the annuity provider whose annuities are used by some of the sponsor's retirees subsequently goes bust.

A long time

The FAB also highlighted ERISA's six-year statute of limitations. Under ERISA, an action for a breach of fiduciary duty may not be brought after the earlier of:

- Six years after the date of the last action that constituted a part of the violation or, in the case of an omission, the latest date on which the fiduciary could have cured the violation, or
- Three years after the earliest date on which the plaintiff had actual knowledge of the breach.

Thus, if a plaintiff makes a claim based on the imprudent selection of an annuity contract to distribute benefits to a specific participant, the plaintiff has to file the claim within six years of the date on which plan assets were expended to purchase the contract.

A look ahead

Will this clarification open the door to more employers offering annuities? The DOL expects to issue more guidance in the future to further encourage use of annuities in 401(k) plans.

Shut the door

IRS ends defined benefit plan lump sum payouts

Last summer, the IRS effectively overturned a number of private letter rulings issued during the past several years. Those rulings allowed plans to amend their qualified defined benefit (DB) plan to permit a participant in pay status to elect to convert the remaining value of the participant's annuity payments to a lump sum payment during a temporary "window period." Subject to spousal consent rules, such windows provide limited-time opportunities for participants to elect to receive their benefits in the form of a lump sum where the plan doesn't otherwise allow lump sum payments.

This "de-risking" strategy was seen as a way to address concerns over the increased volatility of plan assets and the fact that retiree longevity is increasing. In addition, the IRS indicated that it will amend the required minimum distribution rules to prohibit the acceleration of payments currently in annuity form.

Prior letter rulings generally allowed only lump sum distributions when the result increased the benefit amount. They also enabled the payout of an accelerated benefit in a joint and survivor payout plan only if the survivor was someone other than the retired plan participant.

Because of ambiguity about the actuarial standard for determining whether a lump sum benefit constituted an actual increase in benefits, most DB sponsors sought private letter rulings from the IRS authorizing their particular lump sum window programs. The IRS will no longer issue such rulings.

The IRS left the door open, however, to allowing lump sum and accelerated DB plan payouts. Sponsors may still use them if they occur in conjunction with a plan amendment written for that purpose, which was adopted or authorized by a private letter ruling, communicated to eligible plan participants, or incorporated into a labor union agreement adopted before the rule's effective date.

The solution for skyrocketing audit fees

Finding ways to cut costs while maintaining quality seems to be at the top of every executives to do list. As the person responsible for your organization's employee benefit plan audit, we can help you not only reduce your audit costs but also provide a higher level of service.

Pension auditors must sift through enormous amounts of financial data in accordance with the requirements of numerous laws, regulations and professional standards. If they don't know what they're doing, they can easily get lost in the numbers, run up large fees and fail to provide an accurate assessment of a plan's financial status.

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Insero & Company specializes in pension plan audits. Our professionals have extensive experience in this area and to ensure that our audits meet the highest standards of quality, our firm is a member of the American Institute of Certified Public Accountants (AICPA) Employee Benefit Plan Audit Quality Center and is registered with the Public Company Accounting Oversight Board (PCAOB).

Insero & Company is the independent registered public accounting firm for many companies that file a form 11-K with the Securities and Exchange Commission. We currently perform audits for more than 100 plans ranging in size from 100 to 60,000 participants, and from $1 million to more than $10 billion in assets.

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