Employee Benefits Plan Newsletter

Late Summer EBP News Bites

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Are you ready to catch up on some of the recently issued guidance and other information provided by the Internal Revenue Service (IRS), Department of Labor (DOL) and Social Security Administration (SSA) regarding employee benefit plan matters? The government regulators have been busy and we have been as well.

Over the summer, our Employee Benefit Services Group (EBSG) has been engaging with Federal government regulators on behalf of our clients. We have assisted our clients in responding to IRS letters which include:

- the dreaded "226J" letter which contains an estimated penalty amount (which has typically been six figures for the 2015 year) pertaining to errors identified on reported ACA forms 1094/1095 to the IRS (more information on IRS initiatives for the 2016 filed forms is discussed later in this newsletter);
- Employee Plan Compliance Unit questionnaires regarding compliance topics (e.g., minimum funding and partial terminations); and,
- IRS penalty notices for delinquent and non-filed Form 5500s.

In addition, formal reviews by the regulatory agencies have increased as we describe in this newsletter.

IRS Examinations and DOL Investigations

In a prior *Employee Benefits Plan Newsletter*, we provided details of the different types of plans selected for review by the government agencies and some of the areas that required corrective actions or further processing.

These regulatory reviews can be very time consuming and require an employer to use resources to gather/review/provide information to the regulators. Our professionals work with clients to expedite the Agency's processing by performing a pre-audit of the materials and acting as an intermediary to furnish responses to requests for materials and questions.

Currently, our EBSG is representing seven (7) plans that have been selected. The majority are 401(k) plans; however, the IRS has also selected a defined benefit and a money-purchase plan. Both of those types of plans have a minimum funding requirement for which the IRS has requested documentation to support the employer contribution reported on the Form 5500 and in the plan's financial statements. In addition, not-for-profit organization plans that were selected include 403(b) and 401(k) plans, a money-purchase plan, and defined benefit plans.

The IRS agents assigned to the examinations were consistent in their response regarding the random selection of the plan and that the plan selected had features/characteristics that satisfied the IRS Work

Plan criteria. In all situations, the requested materials comprised: plan documents, nondiscrimination testing and distribution verification including benefit election forms, accrued benefit calculations/account balance statements, and Form 1099-R reporting.

The plan selected by the DOL needed to provide a written procedure of the employee contributions and related processing of transmitting those contributions to the plan before the investigator would "close" the investigation. The prior *Employee Benefits Plan Newsletter* containing other areas that have been reviewed can be located here.

IRS Finalizes Regulations Allowing Plan Forfeitures to Fund QNECs and QMACs

The IRS recently finalized regulations that allow 401(k) plans to use forfeiture money to fund qualified non-elective contributions (QNECs) and qualified matching contributions (QMACs). QNECs and QMACs are types of employer contributions used by many 401(k) plans to satisfy annual non-discrimination testing [the actual deferral percentage (ADP) and actual contribution percentage (ACP) tests]; and by 403(b) plans (ACP testing only).

The final regulations change the requirements to provide that QNECs and QMACs must be vested when allocated to participants. This means that unvested money in the plan's forfeiture account can fund QNECs and QMACs as long as those contributions become vested when allocated to participants.

The new regulations apply to plan years ending on or after July 20, 2018. However, plans have been allowed to rely on the relaxed restrictions of the new rules since the proposed regulations were issued last year. The IRS *Issue Snapshot – Plan Forfeitures Used for Qualified Non-Elective and Qualified Matching Contributions* can be reviewed here and provides a useful summary of this new regulation.

IRS Continues to Issue ACA Penalties

The Internal Revenue Service is beginning to analyze the Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage,* and Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns*, filed by employers for the 2016 tax year. These tax filings became mandatory for employers beginning with the 2015 tax year. The reporting requirements are a provision of the Affordable Care Act (ACA) of 2010. The IRS will soon begin assessing potential penalties to any employer deemed not in compliance with the reporting requirements for 2016.

These potential 2016 penalties will be a continuation of what the IRS initiated starting in November 2017 when the Service began sending more than 30,000 Letter 226J notices that included some $4.4 billion in assessed penalties to employers deemed not compliant with the employer mandate, also known as the Employer Shared Responsibility Payment (ESRP). These penalties were related to the 2015 plan year.

It is expected that the process for identifying ACA non-compliance for the 2016 tax year will be even more vigorous than it was for 2015, as the IRS is employing more sophisticated methods of tracking compliance. Employers that have not yet received a penalty notice for 2015 should not yet feel total relief as the IRS continues to issue notices pertaining to 2015.

These developments should serve as a reminder to employers that the IRS is serious about ACA compliance and that they should ensure accurate reporting processes in order to avoid penalties.

The EBSG at PKF O'Connor Davies has assisted many clients with the preparation and filing of the Forms 1094-C and 1095-C. We have also assisted a number of clients who received the Letter 226J from the IRS containing substantial penalties, and who elected to dispute the penalties by responding to the IRS via Form 14764. Through our analysis and communications with the IRS, we have been able to minimize those penalties and — in virtually all cases — eliminate them altogether.

SSA Notifying Employers of Name/SSN Errors

Beginning in August 2018, the Social Security Administration began mailing notices to businesses and employers who submit the Form W-2 (Wage and Tax Statement) for their employees containing names and Social Security Numbers (SSNs) that do not match SSA records. The SSA refers to these notices as "Educational Correspondence," or EDCOR. This initial EDCOR is informational in nature, providing general knowledge on the issue of mismatched data and offering resources to assist employers in ensuring that accurate employee data is being transmitted to the SSA. Subsequent notices, scheduled to go out to employers beginning in 2019, are expected to cite specific discrepancies in employee data which will require employer review and correction.

There are various reasons why the employer's information may not match what the SSA has on file, including typographical errors, unreported name changes (such as those that come about as a result of a change in marital status), and inaccurate or incomplete data. Accurate reporting of employee data is imperative in order for the SSA to reconcile employer wage reports and credit earnings to a worker's record. If the employee data is incorrect, it may result in a loss of Social Security benefits to which he or she is entitled.

Employers also need to be aware that the IRS may impose penalties to any employer who fails to file and furnish accurate information on the Form W-2 (under Code Sections 6721 and 6722, respectively). Penalties may apply if an employer:

- Fails to file timely
- Fails to include all required information
- Includes incorrect information (including name and/or SSN that doesn't match government records), and
- Filing on paper when electronic filing is required

Failure to file may mean assessed penalties of $270 per W-2, to an annual maximum of $3.2 million. Failure to furnish is also subject to penalties. Failure to file AND furnish are subject to penalties of $540 per W-2, to a maximum of about $6.5 million annually.

These developments should serve as a reminder to employers that government agencies are serious about compliance and that they should ensure accurate reporting processes in order to avoid penalties. For more information, including samples of letters being mailed to employers, please visit here.

Quick News Bits

403(b) Plans. Some 403(b) plan sponsors have started to receive IRS approved prototype or volume submitter type of plan documents from their record keeper or other service provider. These "new" plan documents are required to be adopted by March 31, 2020. The plan documents provided are pre-populated with provisions that are included in the existing plan document. However, there are several additional choices and required attachments that will require consideration for its completion. One example of this process: all amendments that have been made to a plan since its inception [whether it is the 2009 plan year — this was the initial year the IRS required a 403(b) plan document — or a subsequent plan year] will be required to be identified in the new plan document. A prior *Employee Benefits Plan Newsletter* provided additional information on the 403(b) plan document update. That newsletter can be found here.

Tax Law Changes Affecting Employee Benefit Plans. Both the Tax Cuts and Jobs Act of 2017 (TCJA) and, subsequently, the Bipartisan Budget Act (BBA) made changes that can affect the operation of an employee benefit plan. Areas that are impacted include – changes made to the availability of a hardship withdrawal for a casualty loss deduction, other changes that have the effect of liberalizing the availability or removing restrictions to hardship withdrawals, impact to the definition of compensation for the elimination

of the deduction for moving expenses, the addition of a 21% excise tax on tax-exempt organizations for covered employee remuneration exceeding $1 million in tax years beginning in 2018. Tax Notes on the two (2) law changes are available at TCJA and BBA.

IRS Has Revised Voluntary Correction Program (VCP) Forms. In June 2018, the IRS revised three (3) forms used in the voluntary applications that are submitted to the IRS by plan sponsors to correct qualified retirement plan or 403(b) plan errors. The "model" forms are used by plan sponsors to correct common errors. The revised forms are intended to remove unnecessary questions and facilitate the completion of the forms. Applications that are submitted to the IRS must contain these new forms or risk the application being returned and/or delay of its processing.

Contact Us

The Employee Benefit Services Group at PKF O'Connor Davies is available to assist employers with the various compliance reporting and other requirements imposed by Federal agencies. We also provide a full spectrum of compliance services for qualified retirement plans, non-qualified deferred compensation plans, and welfare plans. For more information, please contact your client services partner or either of the following:

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