Employee Benefits Plan Alert

Late Summer EBP News Bites – 2019

By Louis F. LiBrandi, Principal and Anthony Bianchi, Senior Tax Associate

Are you ready to catch up on some of the recently issued guidance and initiatives provided by the Internal Revenue Service (IRS) and Department of Labor (DOL) 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 and others as referred from our webpage and other sources. We have assisted in these situations by preparing responses to IRS letters and DOL notices and are sharing them with our readers.

Affordable Care Act (ACA) Penalty Letters

The "226-J" letter is sent to a taxpayer and it contains an estimated penalty amount pertaining to a preliminary calculation of the Employer Shared Responsibility Payment (ESRP). The IRS is continuing its prior 226-J letter notification process which is including years through 2017.

In our last summer newsletter, we communicated that over 30,000 letters have been issued by the IRS on this matter.

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 226-J 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.

In addition, the IRS has added a "5699" letter to this campaign which is a notice sent to an employer the IRS believes is an Applicable Large Employer (ALE) that failed to file the applicable 1094/1095 series forms as required by IRS Code Sections 5721/5722. Responding to this type of letter requires a thorough review of all the facts and circumstances involving the employer's workforce (part-time and full-time employment status, independent contractor classification and reporting, etc.). We have been able to obtain an extension of the time period to comprehensively prepare a response to the IRS and delayed the effective date of the possible assessment of any penalty and interest by the IRS.

IRS Penalty Notices for Delinquent and Non-Filed Form 5500s

It is our understanding the IRS and DOL are working together to identify and notify plan administrators of "delinquent" or "non-filed" Forms 5500 for employee benefit plans they sponsor. Frequently, the Form 5500 for a plan was previously reported to the Employee Benefit Security Administration (EBSA). When the EBSA database does not acknowledge/receive a subsequent plan year filing of a Form 5500 (which was not previously marked as a "final" return, or coded to indicate that the plan will not file an annual

report for the next plan year), an IRS notice is sent out requesting additional information regarding the plan's filing status, and it requests a response be provided within 30 days.

In these situations, we have been able to reply to a Notice with a narrative discussion to eliminate any further actions by the government regulators, or utilized the DOL's Delinquent Filer Voluntary Compliance (DFVC) Program. The DFVC Program offers an opportunity for the plan sponsor to "catch-up" on delinquent/non-filed Forms 5500 and pay a significantly reduced penalty.

A further discussion of the DFVC is provided below.

Delinquent Filer Voluntary Compliance Program

The Delinquent Filer Voluntary Compliance Program is sponsored by the Department of Labor to encourage voluntary compliance with ERISA's annual reporting requirements. Specifically, the Program gives plan administrators who are delinquent in the filing of the annual Form 5500 for their retirement or welfare plan a way to avoid higher civil penalty assessments by satisfying the Program's requirements and voluntarily paying a reduced penalty. Program eligibility is limited to plan administrators who are required to file the Form 5500 under Title I of ERISA. Further, the Program is only available to plan administrators who have not already received notice from the DOL of a failure to timely file the Form 5500.

The maximum penalty for a single late annual report is $750 for a small plan (generally a plan with fewer than 100 participants at the beginning of the plan year) and $2,000 for a large plan. For plan administrators who have failed to file an annual report for a plan for multiple years, the DFVC Program includes a per plan cap of $1,500 and $4,000 for small plans and large plans, respectively.

The IRS administers a similar program for the Form 5500-EZ. The Form 5500-EZ is generally required to be filed for a one-participant retirement plan (owner-only or owner and spouse) and for a foreign plan (defined as a retirement plan that is maintained outside the United States) primarily for nonresident aliens. The process needing to be followed for this relief is contained in Rev. Proc. 2015-32. The fee for this program is $500 per delinquent return, up to $1,500 per plan.

403(b) Plans

The time to adopt an amended or restated 403(b) plan is running out. Many 403(b) plan sponsors have completed the transition process of restating their 403(b) plan. Others are awaiting receipt of an IRS approved prototype or volume submitter type of plan 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.

Some employers who are relying on their record keepers and other service providers to make available an IRS approved 403(b) plan document are realizing these service providers did not elect to submit the required application for an Opinion Letter which is issued by the IRS to a plan document preparer when their review of the plan document is completed. In those situations, the EBSG has worked with employers to secure an approved plan document to ensure the applicable provisions of the plan are correctly

identified and represent it to the plan's record keeper and other service providers. This process assists an employer who otherwise may have considered changing their record keeping or other service providers.

IRS Expansion of the Self-Correction Program Under EPCRS

The IRS Employee Plans Compliance Resolution System (EPCRS) permits any size business or organization that sponsors a retirement plan (including SEP and SIMPLE IRA plans) to identify and correct many failures that may have occurred in the operation of a plan, or with the plan documents.

Rev. Proc. 2019-19 currently offers three correction programs:

- Self-Correction Program (SCP) – correct certain plan failures without contacting the IRS or paying a user fee.
- Voluntary Correction Program (VCP) – correct failures not eligible for self-correction or get the IRS's written agreement that specified failures were properly corrected.
- Audit CAP (Closing Agreement Program) – used to resolve failures discovered during an IRS audit that can't be self-corrected.

Expansion of SCP Permits

The IRS expanded SCP in Rev. Proc. 2019-19 to make it easier to fix certain plan documents and operational failures, including plan loan issues, without having to file a VCP submission to the IRS, including:

- The self-correction of certain plan document failures,
- Correction options and possible relief from deemed distributions associated with certain, specified failures involving plan loans made to participants, and
- Additional opportunities for correcting certain operational failures by plan amendment.

DOL Requires Top Hat Statement to be Filed Electronically

The Department of Labor recently issued a final regulation requiring "top hat" plan statements to be filed electronically rather than by mail or personal delivery. This regulation became effective August 16, 2019. Top hat plans are unfunded or insured pension plans that provide deferred compensation for a select group of management or highly compensated employees. Filing the one-time registration statement satisfies ERISA's reporting and disclosure requirements.

Once a statement is filed, it becomes available to the general public on the DOL's website.

Employers that establish new top hat plans will need to use the electronic filing system going forward. Employers with existing top hat plans may want to verify that required filings have been made. Employers can use the DOL's Delinquent Filer Voluntary Compliance Program to pay reduced penalties for any late filings.

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:

Timothy J. Desmond, CPA, Partner
Director, Employee Benefit Services Group
tdesmond@pkfod.com | 551.249.1728

Louis F. LiBrandi, EA, CEBS, ChFC, TGPC, Principal
Employee Benefit Services Group
llibrandi@pkfod.com | 646.449.6327

About PKF O'Connor Davies

PKF O'Connor Davies, LLP is a full-service certified public accounting and advisory firm with a long history of serving clients both domestically and internationally. With roots tracing to 1891, eleven offices in New York, New Jersey, Connecticut, Maryland and Rhode Island, and more than 700 professionals, the Firm provides a complete range of accounting, auditing, tax and management advisory services. PKF O'Connor Davies is ranked 29th on *Accounting Today*'s 2019 "Top 100 Firms" list and is recognized as one of the "Top 10 Fastest-Growing Firms." PKF O'Connor Davies is also recognized as a "Leader in Audit and Accounting" and is ranked among the "Top Firms in the Mid-Atlantic," by *Accounting Today.*

PKF O'Connor Davies is the lead North American representative in PKF International, a global network of legally independent accounting and advisory firms located in over 400 locations, in 150 countries around the world.