

Employee Benefit Plans Alert

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This edition of **Employee Benefit Plans Alert** focuses on the following topics:

- Tax Exempt & Government Entities – Compliance Program and Priorities
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- DOL Voluntary Correction Program for Delinquent Contributions
- Required Amendment List for Qualified Plans
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- Cafeteria Plans – Amendments Needed

The information presented is up-to-date and we hope you find it useful. Do not hesitate to contact us if you have any questions or need guidance.

Tax Exempt & Government Entities (TE/GE) – Compliance Program and Priorities

The TE/GE fiscal year 2023 Program Letter has been issued listing various components the IRS has targeted to promote tax law compliance by tax-exempt and government entities. A goal of the IRS Program is to identify, prioritize and allocate its resources primarily through an examination stream which consists of a single or a combination of compliance actions.

The following is an overview of the areas the IRS has identified.

1. **Worker classification.** Reviewing worker classification to ensure taxpayers are not mis-classifying their workers resulting in the under reporting and payment of employment taxes and the incorrect exclusion from employer retirement plans. Improper treatment of workers can cause a retirement plan to fail to meet the coverage requirement of Internal Revenue Code §410(b).
2. **Small Exempt Organizations that Sponsor Retirement Plans.** This strategy focuses on the review of small exempt organizations to determine if the retirement plan investments are properly administered, whether there are party-in-interest transactions and whether the participant loan programs are meeting the dollar limitation and other rules of Internal Revenue Code §72(p). Improper transactions can result in prohibited transactions and sometimes early distribution penalties.
3. **One-Participant 401(k) Plans.** These examinations will focus on operational or qualification failures resulting in income or excise taxes. Additionally, the review of the plan document is performed to ensure it is current and appropriately executed.
4. **Required Minimum Distributions.** Applicable to larger plans to ensure that the required minimum distribution rules of §401(a)(9) are being followed. Failure to commence these types of distributions could cause a retirement plan disqualification and a 50% excise tax on amounts not distributed.

As an alternative to examinations, Compliance Checks will be issued to plan sponsors who reported unusual, or substantial amounts of plan liabilities on their Form 5500. This method will be used to determine if a retirement plan is engaging in activities that result in taxable unrelated business income. This method will also be used to evaluate if assets were valued correctly and to identify potential prohibited transactions.

Determination Letter Program for 403(b) Plans

In Revenue Procedure 2022-40, the IRS announced that beginning June 1, 2023, determination letters for “individually designed” §403(b) plans may be submitted for any of the following:

- an initial determination letter,
- a determination upon plan termination, and
- in certain other circumstances, specified in guidance published by the IRS.

Similar to the IRS determination letter program that was in-place for qualified retirement plans, the timing for a submission of an application for a 403(b) plan is determined by the last digit of the plan sponsor’s employer identification number (EIN). Based on the last digit of the EIN, a determination letter application for a plan will be eligible for submission on June 1, 2023 (digits 1, 2, or 3) June 1, 2024 (digits 4, 5, 6, or 7) and June 1, 2025 (digits 8, 9, or 0).

Additional guidance from the IRS will be forthcoming on the procedural requirements, forms and updates regarding this new determination letter program.

DOL Voluntary Correction Program for Delinquent Contributions

On November 18, 2022, the Department of Labor (DOL) issued proposed amendments to the Voluntary Fiduciary Correction Program (VFCP) and Prohibited Transaction Exemption 2002-51 (PTE 2002-51). The VFCP provides relief from civil liability and an exemption from excise taxes under the Internal Revenue Code (IRC) to employee benefit plan fiduciaries if they voluntarily report and correct certain transactions that breach their fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA).

The most meaningful change that the proposed amendments provide is the ability to self-correct for delinquent participant contributions and loan repayments. This is a frequent problem that is identified on plan audits of financial statements or during compliance reviews of retirement plans.

Background: VFCP and PTE 2002-51. The DOL established the VFCP to encourage voluntary compliance with ERISA by giving plan fiduciaries relief from civil liability if they disclose certain fiduciary violations in a VFCP application that is filed with the DOL's Employee Benefits Security Administration (EBSA).

To be eligible for relief under the self-correction option:

- The amount of lost earnings must be \$1,000 or less (not including any excise taxes).
- The delinquent contributions or loan repayments had to have been remitted to the plan within 180 calendar days of withholding or receipt.

The applicant must:

- use the correction method specified by EBSA;
- electronically file a self-correction notice (SCC Notice) with EBSA that meets certain content requirements; and
- submit a retention record checklist and required documents.

Applicants using the self-correction option would not receive a no-action letter from the DOL.

EBSA did not propose a limit on the number of times the self-correction option could be used during a specified period.

Adding a self-correction methodology for fixing common errors such as failing to timely send employee salary withholding contributions and participant loan repayments is advantageous for retirement plan sponsors. This will help to streamline the correction process for plan sponsors (and service providers who assist plan sponsors) to correct inadvertent plan administration errors.

The DOL is soliciting comments on these proposed amendments and, when finalized, a future **Employee Benefit Plans Alert** will include the final provisions.

Required Amendment List for Qualified Plans

On November 21, 2022, the IRS issued [Notice 2022-62](#) which provides the 2022 Required Amendments List for qualified retirement plans and §403(b) retirement plans. The Notice states that the 2022 Required Amendments List has no entries listing changes in qualification requirements for retirement plans. Qualified retirement plans are those retirement plans that must satisfy the various requirements listed in §401(a) of the Internal Revenue Code (IRC).

The Notice of required amendments is issued annually by the IRS to assist plan administrators, sponsors and providers of plan documents with the amendments that are required to be made to retirement plan documents so that the "form" of the plan remains tax qualified.

PCORI Fees Updated for 2023 – Form 720

The IRS has announced in [Notice 2022-59](#) that the Patient-Centered Outcomes Research Institute (PCORI) annual fee paid by employers with self-funded group health plans has been increased for 2023. For policy years that end between October 1, 2022 and October 1, 2023, the per capita fee has increased to **\$3.00** per participant. The PCORI fee was increased .21cents from last year. The PCORI fee has been extended for another 10 years under the Consolidated Appropriations Act of 2020.

The Form 720 is used to report the PCORI fee and is due no later than July 31 of the calendar year immediately following the last day of the policy/plan year to which the fee applies.

The PKFOD Employee Benefit Services Group has assisted several clients to evaluate the optional methods available for reporting for this annual filing requirement.

ACA Tax Form Reminders

Employers with 50 or more full-time employees (including full-time equivalent employees) in the previous year will be required to file the IRS Forms 1094-C and 1095-C (the Forms) for the 2022 calendar year.

The IRS has not yet released either draft or final instructions for completing the 2022 Forms. It is assumed that the filing deadlines will remain like prior year filings (i.e., a January 31, 2023 due date for delivery of the individual Form 1095-C to each employee and a March 31, 2023 deadline for electronic filing of the Forms with the IRS).

One item of note is a change in the affordability percentage under the employer mandate for 2023. Health insurance coverage is considered "affordable" if employee contributions for employee-only coverage do not exceed a certain percentage of the employee's household income. The original affordability threshold amount was set at 9.5% in 2014 and has been adjusted annually for inflation. For 2023, the affordability percentage is set at 9.12%, a historic low since the inception of the employer mandate. The decrease in the percentage is due to health care changes enacted under the American Rescue Plan.

Per IRS Notice 2020-76, the IRS will no longer provide relief where incorrect or incomplete information is reported on ACA reporting. Relief was provided for reporting years 2015 through 2020 if good faith efforts to comply were shown by the reporting entity. Organizations will be responsible for ensuring data like EINs, DOBs and other information in the Form 1095 are accurate.

Cafeteria Plans – Amendments Needed

As part of COVID-19 relief, the Consolidated Appropriations Act, 2021 (CAA) permitted plan sponsors to immediately implement certain mid-year changes to their cafeteria plans during the 2020 and/or 2021 plan years without first having to adopt plan amendments. Employers that implemented such relief are required to adopt certain retroactive plan amendments by December 31, 2022.

The CAA allowed plan sponsors to immediately implement several cafeteria plan changes with respect to health and dependent care Flexible Spending Arrangements (FSAs) and health coverage elections, including either allowing carryover of unused amounts from the 2020 and 2021 plan years. It also permitted the extension of the grace period for incurring claims for plan years ending in 2020 and 2021 through December 31st of the following year.

The proposed cafeteria plan amendments state that the failure to properly amend a cafeteria plan can result in the plan not being a cafeteria plan and an employee's election between taxable and nontaxable benefits resulting in gross income taxable to the employee. Therefore, the failure to timely amend a cafeteria plan could have tax ramifications to the participant. The December 31, 2022 deadline has implications for both calendar-year and non-calendar-year plans.

Employers with calendar-year cafeteria plans should confirm whether they have been amended to reflect 2021 plan year changes implemented pursuant to the CAA.

Employers with non-calendar year plans should confirm whether they have been amended to reflect any 2020 plan year changes implemented pursuant to the CAA. Non-calendar year sponsors also may wish to amend their plans now for the changes implemented in 2021 to assure timely compliance with the 2023 deadline.

Contact Us

The Employee Benefit Services Group at PKF O'Connor Davies is available to assist employers with all aspects of employee benefit plan compliance. For more information, please contact your client services partner or any of the following:

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