

Defined Contribution Legislative and Regulatory Update

AUGUST 2016

We are committed to providing you with the information and tools you need to help meet your fiduciary responsibilities as a plan sponsor and to offer your employees an exceptional retirement plan. This newsletter is designed to inform you about the latest legislative and regulatory developments that may affect your plan.

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From the hill

Tax and Pension Reform in 2017 and Beyond

With the November election rapidly approaching, we're getting a better picture on what the prospects for tax and pension reform may be in the new congress and administration. In June, the House republicans released a series of reports as part of their "Better Way" initiative. The topics examined included poverty, national security, the economy, the Constitution, health-care and tax reform. The efforts on the tax reform report, released on June 24, were led by House Ways and Means Chairman Kevin Brady (R-TX).

The plan proposes collapsing the current seven tax brackets into three. The 10% and 15% brackets would be replaced by a 12% bracket, the 25% and 28% by a 25% bracket, and the 33%, 35% and 39.6% brackets would be lowered to 33%. The plan would also raise the standard deductions to \$24,000 for joint filers and \$18,000 and \$12,000 for head of household and single filers, respectively. Only two itemized deductions would be allowed — deductions for charitable giving and home mortgage interest.

One of the stated goals of the proposal is to be revenue neutral. While part of the revenue neutrality is projected to be achieved through increased economic growth, the report also considers reductions to existing tax expenditures. The two largest tax expenditures, as scored by the Office of Management and Budget, are for health-care and retirement savings (\$2.74 trillion and \$1.54 trillion, respectively, over 10 years). The report on health-care proposed a cap on the current exclusion of the value of employer-provided health-care insurance, although no specifics are given as to the level of the cap.

With respect to retirement savings there is some uncertainty. The report states that it "will continue tax incentives for retirement savings," but also says that it will "examine existing tax incentives for employer based retirement and pension plans in developing options for an effective and efficient overall approach to retirement savings." It should be noted that an earlier republican tax proposal, introduced in 2014, funded income tax rate reductions in part by limiting the amount of 401(k) contributions that could be made on a pretax basis and freezing any increases to current contribution limits for a 10-year period.

Former Secretary Clinton's tax policies regarding retirement savings mirror much of what we've seen in President Obama's budget. She proposes limiting the tax value of certain exemptions and deductions to 28%. This would include pretax contributions to retirement plans as well as the value of employer provided health-care. Mr. Trump recently made revisions to his tax policy that would bring it closer in line with the House GOP proposal, although he has in the past suggested limiting the value of itemized deductions.

Tax reform has always served as a good vehicle for pension reform, and there are areas where there is a good deal of bipartisan support — multiple-employer plans (MEPs), arrangements that allow small employers to band together in a common retirement plan and outsource most of the administration, are a good example. Both sides of the aisle favor removing the current DOL requirement that

employers must have some common interest and eliminating the IRS "bad apple" rule, which states that a disqualifying event by a single employer disqualifies the entire arrangement.

Other areas of agreement can be found in a report issued by the Senate Finance Committee last July including increasing startup credits for small employers, encouraging higher default rates for automatic enrollment and promoting automatic acceleration of contributions, and encouraging plan sponsors and participants to consider lifetime income options.

Senators Rob Portman (R-OH) and Ben Cardin (D-MD) have also expressed interest in working together to develop a comprehensive pension reform proposal. While they were in the House of Representatives, Senators Portman and Cardin were the primary architects of the pension reform provisions that were in the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) in 2001. Nothing is certain as of yet as Senator Portman is facing a strong challenge in his reelection bid this November. Key areas that they've expressed a desire to address include lifetime income and simplification of administrative hurdles.

Practical Considerations

Changes in tax and pension law can have a profound impact on plan design and administration. New incentives and opportunities may arise as well as new constraints. Plan sponsors and their service providers need to keep a close eye on any developments in this area in order to gauge the potential impact. At Empower Retirement, we are active in retirement industry advocacy efforts and will keep you apprised of new initiatives and actions.

Potential Impacts of DOL Fiduciary Rule on Plan Sponsors

The Department of Labor's new rule redefining "investment advice for a fee fiduciaries" (the "Rule") will go into effect in April 2017. While the primary impact of the Rule will be on service providers to plans, there are many ways in which it will also affect those who sponsor retirement plans. The purpose of this article is to highlight some of those potential impacts.

The Rule significantly expands the types of communications that can trigger fiduciary status. The types of activities considered fiduciary activities will include not only things that have historically been viewed as investment advice, but also making recommendations regarding whether to take a distribution from a plan, whether to include a brokerage account in a plan, or the provision of an investment policy statement. To further complicate matters the definition of "recommendation" is defined very broadly to include anything that could be viewed as a suggestion for someone to take or refrain from taking a particular action, and there is no relationship requirement — so even one-time communications, such as those that occur between plan participants and call center representatives, can trigger fiduciary status. For a detailed explanation of the new Rule, please ask your Empower representative for a copy of the Instant Insights article published in April of this year.



From the hill

Following are some impacts of the Rule that plan sponsors may want to consider.

1. Protect your employees

Due to the breadth of the Rule, it could trigger fiduciary status when employees are talking to each other about a fiduciary activity. For example, a conversation between an HR employee and a terminating employee about what to do with the retirement plan account could trigger fiduciary status if there is any compensation (defined very broadly to encompass any benefit) received in connection with the transaction. The DOL created an exemption such that fiduciary status will not be triggered as long as providing the advice or recommendation is not part of the employee's job, they do not hold any securities or insurance license under state or federal law, and they do not receive separate compensation for the advice. Employers may want to review the job descriptions for their HR staff dealing with terminated participants, as well as their compensation practices, to ensure compliance with this exemption. They may also want to avoid putting employees with securities or insurance licenses into those roles.

There is also an exemption available to protect employees who make recommendations to plan fiduciaries. For example, an individual fiduciary or a fiduciary committee may receive reports or recommendations from HR or finance staff related to an investment decision, but the people providing the report do not have discretion regarding the plan and are not intended to be fiduciaries. The only condition for the exemption in this scenario is that the employees providing the recommendation must not receive separate compensation for making the recommendation.

2. Understand the impacts on your service provider relationships

The most significant impacts here may be on plans with less than \$50 million in assets whose investment consultants do not currently act as fiduciaries as it will be difficult for those consultants to retain non-fiduciary status. However, the Rule also impacts recordkeepers, anyone providing distribution, asset consolidation or investment counseling to participants, and potentially others. Key impacts to look for are changes in services (for example, changes in communications designed to ensure that they remain educational and do not contain a recommendation) and changes in how fees are paid. One or more of your service providers may also decide to use the Best Interest Contract prohibited transaction exemption in order to maintain certain compensation arrangements, in which case you will need to review a variety of disclosure materials related to that exemption (although some of those disclosure requirements will not go into effect until 2018). Many service providers are still finalizing their decisions and implementation strategies; however, as we move into the 3rd and 4th quarters of 2016, you should begin to get information about what the impact of those decisions will be on your plan.

3. Review risk management practices

The fact that the Rule is likely to create more fiduciaries and more potential for prohibited transactions increases the risk for plan sponsors acting as named fiduciaries to the plan and responsible for the selection and monitoring of service providers. Additional due diligence may be required in understanding how your service providers will be interacting with participants when communicating about fiduciary activities, such as investing or taking a plan distribution. This includes "live" communications as well as web-based interactions and mailings. It will be important for you to understand whether/when your provider will treat those communications as fiduciary advice and, regardless of which direction your provider takes, how they intend to ensure compliance with the Rule.

If you have fiduciary liability insurance, you may want to review your policy to ensure it will continue to provide adequate coverage given the increased risks for prohibited transactions created by the Rule.

Practical Considerations

Plan sponsors will want to start talking with their service providers and their ERISA counsel in this second half of 2016 to understand the implications of the Rule on their plan as well as on their risk as plan sponsor fiduciaries.



From the courts

Plan Sponsor Sued as Co-Fiduciary for Alleged Plan Investment Advisor Breaches

The plan sponsor of a large 401(k) plan was recently sued in federal court by plan participants for various alleged breaches of ERISA including a claim that the plan sponsor has co-fiduciary liability for alleged failures of the plan's investment advisor to act prudently with respect to the selection of plan investments.

In this case, the plan sponsor hired a third-party investment advisor to select and monitor plan investments, which included designing custom target date funds (TDFs) for the plan. The suit provides that the investment advisor was a named fiduciary in the plan as well as a functional fiduciary with respect to its control over plan assets. The plan participants have sued the investment advisor as a plan fiduciary claiming that the investment advisor imprudently designed the custom TDFs by including improper asset classes and investments in the TDFs and also failed to monitor the TDFs as, according to the participants, the TDFs underperformed their benchmarks since inception.

The participants have also sued the plan sponsor with regard to the TDFs claiming that the plan sponsor imprudently hired the investment advisor to provide TDF services and the plan sponsor has co-fiduciary responsibility for the failure to monitor and take action with respect to the TDFs alleged poor performance. Under ERISA, a fiduciary with respect to the plan will be liable for the breach of another fiduciary if he or she has knowledge of the breach and does not make reasonable efforts to remedy the breach. The participants claim that both the investment advisor and the plan sponsor failed to promptly remove the TDFs when it was apparent that they were imprudent.

Practical Considerations

Although it is unknown how this case will proceed and ultimately be resolved, it is important for plan fiduciaries to understand their co-fiduciary responsibilities and their ongoing duty to monitor service providers. As noted above, a plan fiduciary is liable for the breach of other plan fiduciaries if he or she has knowledge of a breach by the other fiduciary and does not make reasonable efforts to remedy the breach. This is particularly important in the case where the plan sponsor has hired a third-party fiduciary to provide plan services, such as investment services, as the plan sponsor has a general ongoing duty to monitor plan service providers. Plan sponsors should have a process in place to regularly monitor service providers to ensure they are complying with ERISA's standards, as applicable, and to take action if it is determined that the provider is breaching its ERISA duties to the plan and participants.

This case also reflects the importance of maintaining a prudent process for hiring plan service providers. The participants in this case claim that the plan sponsor acted imprudently when it hired the investment advisor, as they claim the investment advisor did not have the experience or track record for managing TDFs. Under ERISA, prudence requires a plan fiduciary to engage in a thorough process. When hiring service providers, plan sponsors should thoroughly investigate and analyze available options in the marketplace and maintain records and documents used to make the hiring decision.

Court Finds Participant in Breach of ERISA for Failure to Return Overpayment

In the normal course of plan administration, a plan may mistakenly pay a participant an amount that he or she is not entitled under the terms of the plan. The IRS generally considers such "overpayment" as a qualification defect that requires the plan sponsor to take reasonable steps to have the participant return the overpayment to the plan. The question for plan sponsors is what reasonable steps should they take and what legal remedies are available.

In a recent case, the U.S. District Court of New Jersey held that a plan participant who refused to return an overpayment she received in error from a plan was deemed a fiduciary under ERISA with respect to the plan assets in her control and was in breach of ERISA for failure to return the assets to the plan. In this case, after having received her full benefit from the plan, the plan mistakenly paid the participant an additional amount of over \$200,000. The plan notified the participant of the error and requested the overpayment be returned to the plan. When the participant failed to return the overpayment after a period of time, the plan filed suit against the participant in federal court for breach of fiduciary duty under ERISA.

Under ERISA, a plan fiduciary is anyone who exercises any authority or control over plan management or plan assets. An ERISA fiduciary is defined in terms of functional control and authority over the plan and plan assets, and not in terms of a formal trusteeship or other appointment. In order to bring a breach of fiduciary duty claim, the defendant must be a plan fiduciary and must have breached his or her fiduciary duty that resulted in losses to the plan.

In review of the claim, the Court noted that ERISA's definition of fiduciary "encompasses those who knowingly and unlawfully retain plan assets to which they are not entitled" and that, in this case, the participant became a fiduciary because she retained control over plan assets that she was not entitled. The Court held that the participant breached her fiduciary duty to the plan by failing to return the overpayment and using the plan's assets for her own benefit. As a result, the Court found that she is personally liable and must make the plan whole for any losses resulting from the breach.

Practical Considerations

This case clearly reflects the fact that the determination of fiduciary status and liability under ERISA is based on the actions and control of the individual or entity with respect to the plan and not on a particular plan title or role. Even in cases where a person has never agreed to become a fiduciary or was never appointed to a fiduciary role, he or she may become a fiduciary and subject to ERISA due to his or her actions and control of plan assets. With respect to overpayments, this case clearly affirms that plan sponsors have a remedy under ERISA to recover overpayments from plan participants or others who have received plan assets in error.



From the regulatory services team

Department of Labor Increases Penalties to Keep Pace with Inflation

On June 30, 2016, the Department of Labor (DOL) published an interim final rule increasing civil monetary penalties to account for inflation. The Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 (the "Inflation Adjustment Act") required federal agencies, including the DOL, to adjust their civil monetary penalties to account for inflation. In 2015 the Inflation Adjustment Act was amended to require federal agencies to issue an interim final rule by July 1, 2016, adjusting their civil penalties for inflation through October 2015. After this initial "catch-up" adjustment, agencies must continue to adjust their civil penalties accordingly, on an annual basis.

The rule's catch-up adjustments apply to penalties assessed after August 1, 2016, where the associated violations occurred after November 2, 2015. Violations occurring on or before November 2, 2015, and assessments made on or before August 1, 2016, for violations occurring after November 2, 2015, will continue to be subject to the civil monetary penalty amounts set forth in the DOL's existing regulations. The catch-up increase effective for penalties assessed after August 1, 2016, is capped at 150% of the November 2, 2015, level. Beginning in 2017, the DOL inflation adjustments to those penalties will be announced no later than January 15th of each year.

While some of the increases are relatively insignificant, others are major — the penalty for failing to file Form 5500 has nearly doubled from \$1,100 per day to \$2,063 per day. On the other hand, the DOL did not increase penalties for delays in providing plan participants with summary plan descriptions (SPDs).

A chart showing the penalty increase for a specific violation can be found on the DOL website at the following address:

<https://www.dol.gov/ebsa/pdf/fs-interim-final-rule-adjusting-erisa-civil-monetary-penalties-for-inflation.pdf>

Plan Sponsor Considerations

Regardless of this change, of course, plan sponsors should regularly review their benefit plans for compliance with ERISA's reporting and disclosure requirements. You should be aware, though, that increases in penalties for ERISA violations are coming into effect. Please also keep in mind that, in some cases, DOL or IRS correction programs may be available to reduce these new penalties. If you'd like more information on this topic, we welcome you to reach out to your Empower plan contact.

Major Proposed Changes to Form 5500 Reporting Requirements

On July 21, 2016, the DOL, IRS and PBGC published in the Federal Register a Notice of Proposed Forms Revisions to the Form 5500 Annual Return/Report Series. The goal of the changes is to improve and modernize the Form 5500 annual return/report. These changes would affect retirement, health and other welfare plans. Any revisions are expected to apply for plan years beginning on or after January 1, 2019. Below is a summary of some of the proposed changes.

Group Health Plans

Changes specifically focused on group health plans include removing the exemption from Form 5500 reporting for small insured and self-insured welfare benefit plans. The proposal clarifies that compliance with the new Form 5500 reporting requirements would satisfy certain reporting requirements for transparency that were added by the Affordable Care Act. Group health plans would be required to complete a new detailed schedule (Schedule J). The new comprehensive Schedule J (Group Health Information) would indicate the types of health benefits offered and the funding method, including information about participant and employer contributions, and whether the plan is insured, uses a trust, or pays benefits from the employer's general assets. It would require information about COBRA coverage and insurer refunds, and would also ask whether the plan claims grandfathered status under health-care reform or is a high-deductible health plan, HRA, or health FSA. Plan sponsors that have been exempt from filing Form 5500 for their small group health plans will want to consider options for having a Form 5500 completed on these plans if these changes are implemented.

Other Proposed Changes:

- **Financial Reporting.** One of the objectives is to modernize financial reporting by improving the reliability and transparency of information reported regarding employee benefit plan investments and other financial transactions. The focus will be on improvement of reporting on alternative investments, hard to value assets, and investments through collective investment vehicles. These assets would be broken out in more detail on the financial schedule (Schedule H) of the Form 5500. Currently, these types of investments are reported in the "other" category for assets of the plan. Plan administrators would disclose more detailed information on the nature of plans' administrative expenses such as amounts paid for salaries, audit, legal, recordkeeping and actuarial fees, and other expenses. Also, more detailed information would be required to report fees charged to participant accounts separately from fees charged to other plan asset sources and how these fees were allocated among participants.

For small filers, it will be more restrictive as to their ability to file under Form 5500-SF, depending upon their categorization of investments. For small plans not eligible to file on Form 5500-SF, the proposal would eliminate Schedule I and would require these plans to complete a Schedule H (which requires more detailed financial information). Also, the exemption from the auditor requirement would be based on the number of plan participants with account balances at the beginning of the plan year, instead of the total number of participants at the beginning of the plan year.

- **Data Mining.** The proposed changes seek conversion of more elements of the Form 5500 information into data structured to make them usable for mining data and other analytics. This conversion would include the schedule of assets held for investment purposes and would allow private sector data users to develop more individualized tools for sponsors to evaluate their retirement plans and for employees to manage their retirement savings.



From the regulatory services team

- **Service Provider Fee Information.** The proposal would better harmonize reporting on Schedule C of the Form 5500 with the final Section 408(b)(2) fee disclosure requirements in the DOL's service provider disclosure regulations. The Schedule C reporting would more closely track the information that service providers are required to disclose to plan fiduciaries. The updates would provide for a powerful tool for improved evaluation of service arrangements involving investments, recordkeeping, and other administrative services. Schedule C required reporting would also be expanded to include small retirement plans.
- **Enhance Compliance with ERISA and the Code.** The proposed revisions to the Form 5500 would add a number of new compliance-related questions to the Form 5500 and expand other existing questions to facilitate agency oversight of retirement plans. The proposal would add selected new questions regarding plan operations, service provider relationships, and financial management of plans with the goal of improving plan operations, protecting participants and beneficiaries and their retirement benefits, and educating/providing annual discipline for plan fiduciaries. These additional questions are intended to compel fiduciaries of the plan to evaluate plan compliance with important requirements under ERISA and the Code, and to provide the agencies with improved tools to focus oversight and enforcement resources. New breakout questions for defined contribution plans would include account, contribution and distribution data within the body of the Form 5500. Some sample questions may be:

1. If the plan is frozen, does the plan include Roth contributions?
2. How many participants use self-directed brokerage?
3. What types of QDIAs does the plan utilize?
4. Is the plan an eligible combined plan under 414(x)?
5. Is the plan electing church plan status?
6. Does the plan provide financial advice or financial education to participants?
7. Does the plan offer long-term care insurance?
8. For plans that provide group health benefits, what types of health benefits do they offer?

Limited Scope Audits

The DOL's proposed regulations would update the requirements for certifications for limited scope audits. Limited scope audits can be used by plans with assets held by banks, similar institutions or insurance carriers if the statement or information is prepared and certified by the bank, similar institution or insurance carrier. The proposed changes would make the certifications more detailed and informative, and enhance the DOL's ability to review limited scope audits.

DFE Changes

Plans participating in a Pooled Separate Account, Common Collective Trust or a 103-12 Investment Entities Direct Filing Entity (DFE) would no longer be required to be reported by the plan on a Schedule D. Instead, information on the DFE would be reported on either the Schedule H or the attached schedule of assets. Also, the proposal seeks to eliminate Master Trust Investment Account (master trust) reporting and replace it with a simpler approach.

Plan Sponsor Considerations

Empower will continue to closely follow developments on these proposed changes and provide updates. While it is still early and many of the proposed changes will not be effective for several years, plan administrators may want to begin considering whether they have systems in place to capture the new data that may be required or, if not, begin to plan for the eventuality that this data may be needed down the line.

Fixing Common Plan Errors - A Discussion of Missed Deferrals and Late Contributions

At first look, these two errors seem quite similar. In truth, though, they result from two very different types of plan issues and are resolved under different sets of rules. Below, we have summarized each applicable rule and failure and then discussed how each should be addressed.

Failure to Implement an Employee Withholding Election

A missed deferral opportunity results when a retirement plan participant makes an affirmative election to have an elective deferral contribution (either 401(k) pretax or Roth 401(k)) withheld from his or her paycheck and the withholding is not implemented. Unlike the below discussion of late deferrals, no money is actually being withheld. While the employee's election isn't being honored as it should, at least a portion of his or her pay isn't being held by the company. To address this fairly common situation, the Internal Revenue Service (IRS) has spelled out a self-correction method under the Employee Plans Compliance Resolution System (EPCRS). EPCRS allows retirement plan sponsors to self-correct certain operational failures, such as this type of failure to implement, under Revenue Procedure 2013-12.

Corrective Action Required: When it comes to the attention of a plan sponsor that a participant's election has not been properly implemented, the following correction can be used to resolve the situation. Generally, the plan sponsor must fund a Qualified Nonelective Contribution (QNEC) to the plan on behalf of the participant equal to 50% of the amount that should have been correctly withheld. If the plan funds a matching contribution, the full amount of missed company match must also be funded (i.e., correct associated match based on the full amount of withholding that should have been withheld). A reduced QNEC (40%) is used if the missed withholding is the failure to withhold after-tax employee contributions.



From the regulatory services team

Exceptions to the Required QNEC Contribution under Revenue

Procedure 2013-12: IRS Revenue Procedure 2015-28 recently modified (but did not replace) Revenue Procedure 2013-12 and provides for the avoidance of a QNEC in two situations: 1. when the failure to implement deferral contributions is of a three months or less duration, or 2. involves a deferral failure regarding a plan using auto-enrollment; however, the associated match and earnings must still be funded. This procedure also provides for a reduced QNEC of 25% of the amount the participant would have deferred for failures that exceed three months (up to the maximum period generally allowed for self-correction — the end of the plan year following the plan year the error began). To use any of the new missed deferral corrections under Revenue Procedure 2015-28, certain additional conditions regarding notices and timing must also be met. If the additional conditions are not met, then the original funding requirement (50% QNEC) remains in effect. Please see the July 2015 Defined Contribution Legal and Regulatory Update for additional information on these new corrections.

Adjustment for Earnings: The QNEC and matching contributions must be adjusted for earnings to the date both are funded. If the participant completed an investment direction when originally electing to participate in the plan, this election should be used to determine the earnings adjustment. If the plan uses a default investment fund and the participant did not make an investment election, the applicable earnings of the default fund may be used. If the earnings determination results in a loss, the loss should not be used to offset the required contributions. Please note, under the IRS self-correction program, using the DOL's online VFCP Calculator may not be consistent with the IRS's method for calculating earnings.

Plan Sponsor Considerations

With any correction under EPCRS, plan sponsors should implement processes to ensure the operational error doesn't continue to occur. We recommend plan sponsors consult with an ERISA attorney when correcting operational failures under EPCRS.

Late 401(k) Deposits (including loan payments)

Unlike the above issue, failure to timely deposit employee deferral contributions and participant loan payments is a prohibited transaction under the Employee Retirement Income Security Act (ERISA). The funds are treated as plan assets as soon as they could reasonably have been deposited to the plan. In the meantime, between when they should have been deposited and when they ultimately are, the DOL generally treats the situation as if the plan sponsor has diverted the assets from the plan. The DOL rules require the employer to deposit deferrals to the trust as soon as the employer can; however, in no event can the deposit be later than the 15th business day of the month following the month when they were withheld from pay. This is not a safe harbor for depositing deferrals; rather, these rules set the absolute maximum deadline. If an employer has the ability to segregate and deposit deferrals earlier, this is likely the timing that must be met. The DOL does provide a seven (7) business day safe harbor rule for employee contributions

to plans with fewer than 100 participants, but other than that safe harbor, the DOL generally applies a strict interpretation of how quickly assets must be deferred.

Corrective Action Required: The DOL offers the Voluntary Fiduciary Correction Program (VFCP) to resolve such prohibited transactions. Generally, the program involves depositing the delinquent participant contributions and/or loan payments, funding lost earnings and filing an application with the appropriate Employee Benefits Security Administration (EBSA) office, and providing documentation showing evidence of corrective action taken. There is no requirement to file under VFCP (some employers may elect to correct outside of VFCP — potentially applying the VFCP calculation, but not filing with EBSA or notifying participants). That said, however, the filing allows employers to avoid the penalty tax on the prohibited transaction (generally 20% of the lost earnings or potentially even higher amounts) and may provide for greater assurance against future action by the IRS or DOL.

Adjustment for Earnings: This DOL correction method provides for use of the online VFCP Calculator located on the DOL website to determine lost earnings associated with delinquent contributions and loan payments. The calculator requires the user to determine the date when the late contributions or loan payments should have been deposited, when they were actually deposited, and when the restored earnings will be funded to the plan. (Please note: If the employer experienced a higher rate of earnings on the funds from when they were withheld until the issue is resolved, that higher rate supplants the online VFCP Calculator amount.)

Plan Sponsor Considerations

As noted above, some plan sponsors elect to follow the recommended correction method without filing the VFCP application. It should be noted that late employee contributions and loan payments must be reported on the annual Form 5500 filing (whether or not otherwise reported to EBSA), which includes reporting the status of correcting the failure. Following the DOL VFCP (including filing the application with the DOL and providing notice to affected employees) should be strongly considered to correct delinquent contributions or loan payments. Plan sponsors should also consider consulting an ERISA attorney during this process.

Final Comments

Please keep in mind that missed deferrals and late contributions are different errors. The missed deferral is in regard to a deferral not being applied to a participant's pay. It is an error that follows IRS correction rules and IRS-specified methods for calculating earnings (such as based on actual investment elections of a participant or a default fund if a participant does not have such an election). The late deferral/loan repayment is in regard to such items being withheld from a participant's pay but not timely remitted to the plan. This is an error that falls under the DOL correction program which does allow for use of the DOL's online VFCP Calculator for earnings. As a plan sponsor, it is important to know which particular error has occurred to understand the correction method and terminology that applies.



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