Defined contribution legislative and regulatory update

For 403(b) clients
September 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, a better picture of the prospects for tax and pension reform in the new congress and administration is coming into focus. 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, healthcare and tax reform. The proposals in 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 by the lower 33% bracket. 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 healthcare and retirement savings ($2.74 trillion and $1.54 trillion, respectively, over 10 years). With respect to healthcare, the report proposes a cap on the current exclusion of the value of employer-provided healthcare 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 pre-tax 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%, which would include pre-tax contributions to retirement plans as well as the value of employer-provided healthcare. 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 in order to participate in a MEP. They also favor eliminating the IRS's "bad apple" rule, which provides that a plan-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. In 2001, when they were in the House of Representatives, Portman and Cardin were the primary architects of the pension reform provisions that were in the Economic Growth and Tax Relief Reconciliation Act (EGTRRA). 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. Although none of the current pension proposals would directly impact 403(b) plans, new incentives and opportunities may arise as well as new

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constraints. Plan sponsors and their service providers need to keep a close eye on any developments that could potentially impact your defined contribution plans.

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 (the "Rule") redefining who is a fiduciary by virtue of providing "investment advice for a fee" will go into effect in April 2017. While the primary impact of the Rule will be on service providers to retirement plans subject to the Employee Retirement Income Security Act (ERISA), there are many ways in which it will also affect sponsors of such plans. Non-ERISA retirement plans maintained by public schools and churches, and voluntary-only safe harbor 403(b) plans exempt from ERISA, will also be impacted whenever a recommendation is made to a participant regarding a distribution from the plan or a rollover in or out of the plan.

The Rule significantly expands the types of communications that can trigger fiduciary status. A "recommendation" is defined very broadly to include even a "suggestion" that someone take or refrain from taking a particular action. Even one-time communications, such as a call between plan participants and service center representatives, can trigger fiduciary status. For a detailed explanation of the new rule, please ask your Empower Retirement representative for a copy of the Instant Insights article published in April of this year.

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

1. Protect your employees

Although the Rule does not apply to conversations about the investments in a public school or church plan, or a voluntary-only 403(b) plan exempt from ERISA, fiduciary status could be triggered when employees are talking to a participant about a distribution or rollover. For example, a conversation between a Human Resources (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 from fiduciary status for the employer's staff members so long as:

- Providing the advice or recommendation is not part of the employee's job.
- Employees do not hold any securities or insurance license under state or federal law.
- Employees 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. The employees providing the recommendation to the plan fiduciary will be exempt from the Rule so long as they do not receive separate compensation for making the recommendation.

2. Understand the impacts on your service provider relationships

The Rule impacts anyone providing distribution, asset consolidation or investment counseling to participants, including your employees, recordkeepers, and potentially others. For example, under the Rule, communications that meet the definition of "Education" will not be treated as investment advice. Thus, some service providers will be making changes to their participant communications intended to ensure that they remain educational and do not contain a recommendation. Some may also be changing how fees are paid. Many service providers are still finalizing their decisions and implementation strategies, but as we move into the third and fourth quarters of 2016, you should begin to get information about what the impact of those decisions will be on your plan.

3. IRAs are covered by the rule

Although the Rule does not apply to discussions about investments in non-ERISA plans, it does apply to IRAs. Thus, communications about distributions from the plan or rollovers into the plan may be covered by the Rule regardless of whether the plan is subject to ERISA. Additional due diligence may be required in understanding how your service providers will be

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communicating with participants about distributions from the plan or consolidating assets from prior employer plans or IRAs into the plan. This includes "live" communications as well as web-based interactions and mailings. It will be important for you to understand whether and when your provider will treat those communications as fiduciary advice and how they intend to ensure compliance with the Rule.

Practical considerations

Plan sponsors may want to begin conversations with their service providers in this second half of 2016 to understand the implications of the Rule on their plans.

Department of Labor Increases Civil Penalties to Keep Pace with Inflation

The Federal Civil Monetary Penalties Inflation Act of 1990 (the "Act") requires federal agencies, including the Department of Labor (DOL), to adjust their civil monetary penalties to account for inflation. In 2015, the 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.

The DOL published an initial catch-up adjustment on June 30, 2016, applicable to penalties assessed after August 1, 2016, for violations that occurred after November 2, 2015. The catch-up increase effective for such penalties is capped at 150% of the November 2, 2015, level. These increased penalties do not apply to:

- Violations occurring on or before November 2, 2015.
- Assessments made on or before August 1, 2016, for violations occurring after November 2, 2015.

Beginning in 2017, the DOL's penalty inflation adjustments will be announced no later than January 15 of each year. While some of the increases are relatively insignificant, others are major. Importantly, 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's website at the following address: https://www.dol.gov/ebsa/pdf/fs-interim-final-rule-adjusting-erisa-civil-monetary-penalties-for-inflation.pdf

Practical considerations

These increased DOL penalties apply only to violations incurred by plans subject to the Employee Retirement Income Security Act (ERISA), and in some cases, may be reduced by participating in a DOL or IRS correction program. Public school and church plans are not impacted by ERISA's monetary penalties and neither are voluntary-only 403(b) plans offered by tax-exempt employers meeting all the safe harbor rules for exemption from ERISA.

If you would like more information on this topic, we welcome you to reach out to your Empower Retirement plan contact.

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 fiduciary breaches. The suit claims the plan's investment advisor failed to act prudently with respect to the selection of plan investments and the plan sponsor has co-fiduciary liability for those alleged failures.

In this case, the plan sponsor retained a third-party investment advisor to select and monitor plan investments, and to design custom target date funds (TDFs) for the plan. The suit alleges 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 sued the investment advisor as a plan fiduciary claiming that the investment advisor (1) imprudently designed the custom TDFs by including improper asset classes and investments in the TDFs, and (2) failed to monitor the TDFs, allowing them to underperform their benchmarks from inception.

The participants also claimed the plan sponsor imprudently retained the investment advisor to provide TDF services. They allege the plan sponsor has co-fiduciary responsibility for the failure to monitor and take action with respect to the TDFs' alleged poor performance. Under the Employee Retirement Income Security Act (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 public school, church and voluntary-only 403(b) plans meeting all of the safe harbor rules are not subject to ERISA, many state laws impose fiduciary responsibilities on non-ERISA plan sponsors that are substantially similar to those in ERISA. Additionally, many non-ERISA plan sponsors use ERISA as a guide and best practice. 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 duty of prudence when selecting and monitoring investment providers and other third parties.

In this case, the participants claim the plan sponsor acted imprudently by retaining an investment advisor that did not have the experience or track record for managing TDFs. The importance of utilizing prudent processes when making all plan-related decisions cannot be overstated. A prudent process for selecting a service provider requires a plan fiduciary to investigate and analyze the experience and qualifications of various providers in the marketplace before making a choice.

Likewise, plan sponsors have an ongoing duty to monitor third parties and their performance to ensure the services being provided continue to be in the best interest of the plan and participants. In this case, the plan sponsor would have been well served to have followed a formal process for monitoring the third-party fiduciary's ability to provide investment services, including designing the TDFs for the plan. Prudent monitoring should have allowed the plan sponsor to make reasonable efforts to remove the investment provider or the TDFs in a timely manner and thus avoid the claim of co-fiduciary liability. Documenting the prudent processes used in the hiring and firing decisions is also important.

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, after a participant 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. The U.S. District Court of New Jersey held that the plan participant, having refused to return the overpayment she received in error from a plan, was (1) deemed a fiduciary under ERISA with respect to the plan assets in her control and (2) was in breach of ERISA for failure to return the assets to the plan.

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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 to which 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 and, as a result, 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 fiduciary status and liability under ERISA are 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. There is no requirement that a person agree to become a fiduciary or be appointed to a fiduciary role; he or she may become a fiduciary due to his or her actions and control of plan assets. This case affirms that plan sponsors have a remedy under ERISA to recover overpayments from plan participants or others who have received plan assets in error and exercise control over such assets by refusing to return them.

Although public school, church and voluntary-only 403(b) plans are not subject to the fiduciary rules in ERISA, most state laws impose rules and responsibilities on non-ERISA plan fiduciaries that are substantially similar to those in ERISA. Check with your counsel to determine whether the reasoning in this case could apply to a non-ERISA plan under your state's laws.

From the regulatory services team

IRS issues proposed regulations under Code Section 457(b)

On June 22, 2016, the IRS issued proposed regulations under Code Section 457 with respect to federal legislation issued since the 457 regulations were finalized in 2003. Generally, the proposed regulations apply to compensation deferred under a 457(b) plan for calendar years beginning after the date the proposed regulations are finalized and published. Taxpayers may, however, rely on the proposed regulations immediately.

The bulk of the proposed regulations apply to ineligible 457(f) plans and nonqualified deferred compensation (NQDC) plans of tax-exempt and for-profit employers. There are, however, some clarifications to eligible 457(b) plans. The 457(b) clarifications that apply only to governmental plans, such as those sponsored by public schools, include guidance with respect to:

- A non-spousal beneficiary's ability to roll over eligible amounts from a governmental 457(b) plan into an inherited IRA.
- Allowing eligible, retired, qualified public safety officers to make a tax-free transfer of up to $3,000 per calendar year from a governmental 457(b) plan to pay for qualified accident and health premiums. For this purpose, a public safety officer is defined as an individual serving a public agency in an official capacity with or without compensation as a law enforcement officer, a firefighter, a chaplain, or a member of a rescue squad or ambulance crew. To be eligible for the transfer, the public safety officer must have separated from service due to disability or attainment of normal retirement age under the plan.
- Enabling a beneficiary to receive benefits under a governmental 457(b) plan if a participant were to die while on qualified active military service equivalent to the benefits that would have been provided had the participant returned to work with the employer and then terminated employment.
- Roth accounts – the proposed regulations confirm the following:
  - Designated Roth contributions must be included in income in the year of deferral (made on an after-tax basis).
  - Contributions and withdrawals of a participant's Roth contributions must be credited and debited to a designated Roth account maintained for the participant, and the plan must maintain a record of each participant's investment in the contract (after-tax contributions) with respect to the account.
  - No forfeitures may be allocated to a designated Roth account and no contributions other than designated Roth contributions and rollover contributions described in §402A(c)(3)(A) may be made to the account.
  - Qualified distributions from a designated Roth account are excluded from gross income.

A provision in the proposed regulations that applies to both governmental and tax-exempt 457(b) plans deals with the first day of the month rule. The regulations clarify that if a participant wishes to either revoke or modify an existing participation agreement, that change becomes effective not earlier than the first day of the month after the revoked or modified participation agreement was entered into.

Practical considerations

Sponsors should review the terms of their 457(b) plans and administrative practices to determine whether the plans conform to these IRS interpretations. The regulations may allow sponsors to identify opportunities to simplify plan administration and compliance. If you have questions or would like additional information, please contact your Empower Retirement plan representative.

IRS proposed regulations for 457(f) and NQDC plans of public sector and tax-exempt organizations

On June 22, 2016, the Internal Revenue Service (IRS) issued proposed regulations impacting ineligible 457(f) and nonqualified deferred compensation (NQDC) plans under Code Section 457(f) and Code Section 409A. The proposed regulations confirm that the rules under §457(f) apply to plans separately and in addition to the requirements under §409A. Thus, a 457(f) plan may also be an NQDC plan that is subject to §409A, requiring compliance with both sets of rules in order to effectively defer compensation.

The proposed regulations seek to harmonize §457(f) and §409A in certain respects and contain detailed rules and guidance addressing issues that have long been the subject of debate under Code §457. In particular, the proposed 457(f) regulations:

- Describe what constitutes a deferral of compensation for purposes of Code §457.
- Preserve the use of a non-compete as a valid "substantial risk of forfeiture" for purposes of Code §457, provided the non-compete meets the four requirements set forth in the regulations.

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- Permit the elective deferral of current compensation, which the IRS had previously said was not permitted under Code §457(f), provided that the elective deferral arrangement meets certain requirements.
- Preserve the ability to extend the substantial risk of forfeiture beyond the initial vesting date, provided the employee is compensated for extending the risk of forfeiture beyond his or her original vesting date.
- Describe the manner in which Code §409A and Code §457 rules interact and overlap.
- Describe how to determine the amount and timing of compensation to be included in income for certain "ineligible" Code §457 deferred compensation arrangements.
- Define what constitutes the types of plans that are not subject to Code §457 including:
  - A bona fide severance pay plan.
  - A bona fide sick and vacation leave program.
  - Programs providing for benefits upon a voluntary termination of employment.

The IRS simultaneously released proposed regulations addressing income inclusion rules under Code §409A. Many of the changes are mere clarifications or provide relief for very specific or uncommon occurrences. Two of the proposed changes are significant and involve the timing of payments to be made upon the death of a service provider or a beneficiary. These changes affect nearly every deferred compensation plan and may require plan amendments in order to take advantage of the considerable administrative relief provided.

Several other clarifications included in the proposed regulations are effective immediately and relate to positions the IRS has concluded are not proper under existing regulations. These clarifications relate to:

- Whether a transfer of restricted stock or a stock option constitutes a payment.
- Whether a taxable contribution to a 402(b) trust (nonqualified, funded plan) constitutes a payment.
- Whether the flexibility to determine if a separation from service occurs in connection with an asset sale applies to a stock sale treated as a deemed asset sale.
- Which plans must be terminated in order to apply the exception to the anti-acceleration rules that requires the service recipient to terminate all plans in the same category.

In addition, the proposed regulations would impose further restrictions on the ability to correct "unvested" amounts.

Practical considerations

Sponsors should review the terms of their 457(f) and NQDC plans and administrative practices to determine whether the plans conform to these IRS interpretations. The regulations may allow sponsors to identify opportunities to simplify plan administration and compliance. If you have questions or would like additional information, please contact your Empower Retirement plan representative.

Correcting a failure to implement a participant's 401(k) or 403(b) deferral election versus correcting a failure to timely deposit 401(k) or 403(b) deferrals into the plan's trust

At first glance, these two topics seem quite similar. In truth, however, 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 then discussed how a failure should be addressed.

Failure to implement an employee deferral election

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

Corrective Action Required: When the plan sponsor becomes aware that a participant's election to defer has not been properly implemented, 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 missed deferral would have received a matching contribution, the plan sponsor must also fund the full amount of missed company match that would have applied if the deferral had been handled correctly. 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 the deferral of contributions is of three months or less duration.
2. When the failure involves a deferral failure regarding a plan using auto-enrollment.

In both cases, however, the plan sponsor must fund the associated match and earnings. 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, the DOL calculator is not a preferred 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 their attorney when correcting operational failures under EPCRS.

Late 401(k) or 403(b) deposits (including loan payments)

Unlike the failure to withhold a deferral, 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 reasonably could have been deposited to the plan. The Department of Labor (DOL) generally treats the time period between the date the deferrals should have been deposited and date when actually deposited, 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**; but in no event later than the fifteenth business day of the month following the month the deferrals 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, they will not be treated as being timely if the deposit is later. 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, 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.

From the regulatory services team

Adjustment for Earnings: This DOL correction method provides for use of the VFCP Online 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 during the period from when amounts were withheld to the date deposited, that higher rate supplants the VFCP Online 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) is recommended to correct delinquent contributions or loan payments. Plan sponsors should also consider consulting an ERISA attorney during this process.

Employers sponsoring public school, church or voluntary-only 403(b) plans that are not subject to ERISA should consult with their attorneys to determine how to correct a failure to timely deposit deferrals into the plan's trust.

Final Comments: Please keep in mind that missed deferrals and late contributions are different errors. The missed deferral is in regards 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 regards 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 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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