

# Benefits Counselor – January 2022

## GENERAL DEVELOPMENTS

### DOL, IRS and PBGC Release 2021 Finalized Form 5500 Instructions

The U.S. Department of Labor (DOL), Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation (PBGC) have released instructions for plans and administrators to complete annual Form 5500s. The instructions include changes that the DOL has finalized reflecting provisions of the Setting Every Community Up for Retirement Enhancement (SECURE) Act that relate to filings by multiple employer plans (MEP) and pooled employer plans (PEP). Key changes include:

- Both defined contribution and defined benefit MEPs must include the Multiple Employer Plan Participating Employer Information attachment and indicate participating employers' names, employer identification numbers (EIN) and percentage of total contributions. Defined contribution MEPs must also indicate aggregate year end account balances attributable to each participating employer.
- The instructions clarify that PEPs are also MEPs and must check the box indicating MEP status and provide information required by the MEP attachment. PEPs must also indicate whether the pooled plan provider has filed Form PR (*e.*, the Pooled Provider Registration Statement) and must furnish the acknowledgement code generated by the registration system for pooled plan providers (*i.e.*, the AckID). PEPs may add this information to the MEP attachment or provide as a separate attachment.
- The instructions also require multiple employer welfare arrangements (MEWA) to include the MEP attachment, but note that MEWAs exempt from including financial statements with the Form 5500 (*g.*, unfunded or fully insured MEWAs) need only provide each participating employer's name and EIN. The instructions note that, while the reporting provisions of the Employee Retirement Income Security Act (ERISA), as amended by the SECURE Act, technically do not apply to welfare plans, the DOL believes that collecting participating employer information from MEWAs is authorized.

## RETIREMENT PLAN DEVELOPMENTS

### DOL Issues Statement Regarding Limits of Private Equity Involvement in

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## **Defined Contribution Plans**

The DOL has issued a statement supplementing its 2020 information letter regarding designated investment alternatives with private equity components. In 2020, the DOL issued an information letter affirming that, in appropriate circumstances, fiduciaries of participant directed individual account plans can offer designated investment alternatives with private equity components without violating ERISA, provided that such fiduciaries appropriately addressed certain unique risks of private equity investments. Following the issuance of the 2020 letter, stakeholders have expressed concerns regarding the interpretation of the letter, and the Securities and Exchange Commission has also issued an alert highlighting compliance issues found when examining private equity and hedge fund investments.

The DOL's supplemental statement does not alter the fundamental message of its 2020 letter, but cautions fiduciaries, particularly fiduciaries of small plans, not to misinterpret the letter as saying that funds with private equity investments are appropriate for all 401(k) plans. Although the supplemental statement confirms that the DOL's position in the 2020 letter remains effective, the statement notes that representations in the 2020 letter regarding the benefits of private equity investments were not balanced by contrary data or independent counterarguments, and that the DOL has concerns regarding the adequacy of investment disclosure for private equity investments, consequences of liquidation or transfer of such investments, and the inability of many plan sponsors and fiduciaries to conduct appropriate analysis when selecting or monitoring private equity investments. Given these concerns, the DOL warns fiduciaries against applying the 2020 letter outside its original context and discourages the use of private equity investments in small individual account plans.

## **IRS Updates Procedures for Requesting Determination Letters and Private Letter Rulings**

The IRS issued Revenue Procedure 2022-04, which updates guidance on the determination letter and Voluntary Correction Program (VCP) procedures. Notable updates include:

- Establishing that procedures for obtaining an opinion letter regarding a 403(b) preapproved plan's second six-year remedial amendment cycle beginning July 1, 2020 (and subsequent cycles) are set forth in Revenue Procedure 2021-37;
- Providing that applications for determination letters using Form 5300 may be submitted electronically beginning June 1, 2022, and must be submitted

electronically beginning July 1, 2022; and

- References to "trust documents" have been struck from the list of required documents that must be included as part of a determination letter submission.

## **HEALTH AND WELFARE PLAN DEVELOPMENTS**

### **DOL Announces Temporary Enforcement Policy for Disclosure of Group Health Plan Service Provider Fees**

The DOL issued Field Assistance Bulletin No. 2021-03, which outlines a temporary enforcement policy for fee disclosure requirements applicable to certain group health plan service providers. As amended by the Consolidated Appropriations Act, ERISA's prohibited transaction exemption for reasonable service provider arrangements provides that certain types of group health plan services, including "brokerage" or "consulting" services, are reasonable only if covered service providers disclose detailed compensation information to plan fiduciaries. Disclosure requirements apply to group health plans, including grandfathered plans, regardless of size, but do not apply to qualified small employer health reimbursement arrangements.

Under the temporary enforcement policy, the DOL will not treat a covered service provider as failing to make the required disclosures as long as the provider made disclosures in accordance with a good faith, reasonable interpretation of the amendment. The DOL notes that covered service providers subject to these disclosure requirements are not limited to those that are licensed or marketed as "brokers" or consultants, and that such providers should act reasonably and in good faith when determining their status as covered service providers. However, in the event of an audit, service providers (and likely the plans receiving the disclosures) should be prepared to explain any conclusion that it is not a covered service provider. The DOL also stated that covered service providers may use formulae, *per capita* charges or other reasonable methods to estimate compensation that depends on variables (*i.e.*, not known in advance); however, whatever the disclosure method employed, the DOL will assess the adequacy of such disclosure by whether it allows fiduciaries to evaluate the reasonableness of the compensation and the severity of any associated conflicts. The disclosure requirements apply to any contracts entered into, extended or renewed on or after December 27, 2021.

## **UPCOMING COMPLIANCE DEADLINES AND REMINDERS**



## **Health Plan Compliance Deadlines and Reminders**

HIPAA Breach Reporting: Plans must file their annual breach reports with the OCR by March 1, 2022. The annual breach report is for breaches involving fewer than 500 individuals that occurred during the preceding year. Breaches involving 500 or more individuals must be reported no later than 60 calendar days from the date of the breach's discovery.

Medicare Creditable Coverage: Plans must report the creditable coverage status of their prescription drug plan to the Centers for Medicare and Medicaid Services annually no later than 60 days from the beginning of a plan year. For calendar year plans, this date is March 1, 2022.

## **ACA Reporting Information**

Furnish Forms 1095-B and 1095-C to Participants: Subject to limited exception, plan sponsors of self-funded health plans and Applicable Large Employers (ALEs) must distribute Forms 1095-B and 1095-C to participants by March 2, 2022.

File Forms with IRS: Plan sponsors and ALEs must file the transmittal Forms 1094-B and 1094-C with their corresponding Forms 1095 with the IRS by February 28, 2022 (March 31, 2022, if e-filing).

## **Retirement Plan Compliance Deadlines and Reminders**

Form 1099-R: Plan sponsors must provide copies of the 2021 Form 1099-R to plan participants and beneficiaries by January 31, 2022, and must file the Form 1099-R with the IRS by February 28, 2022 (March 31, 2022, if e-filing).

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