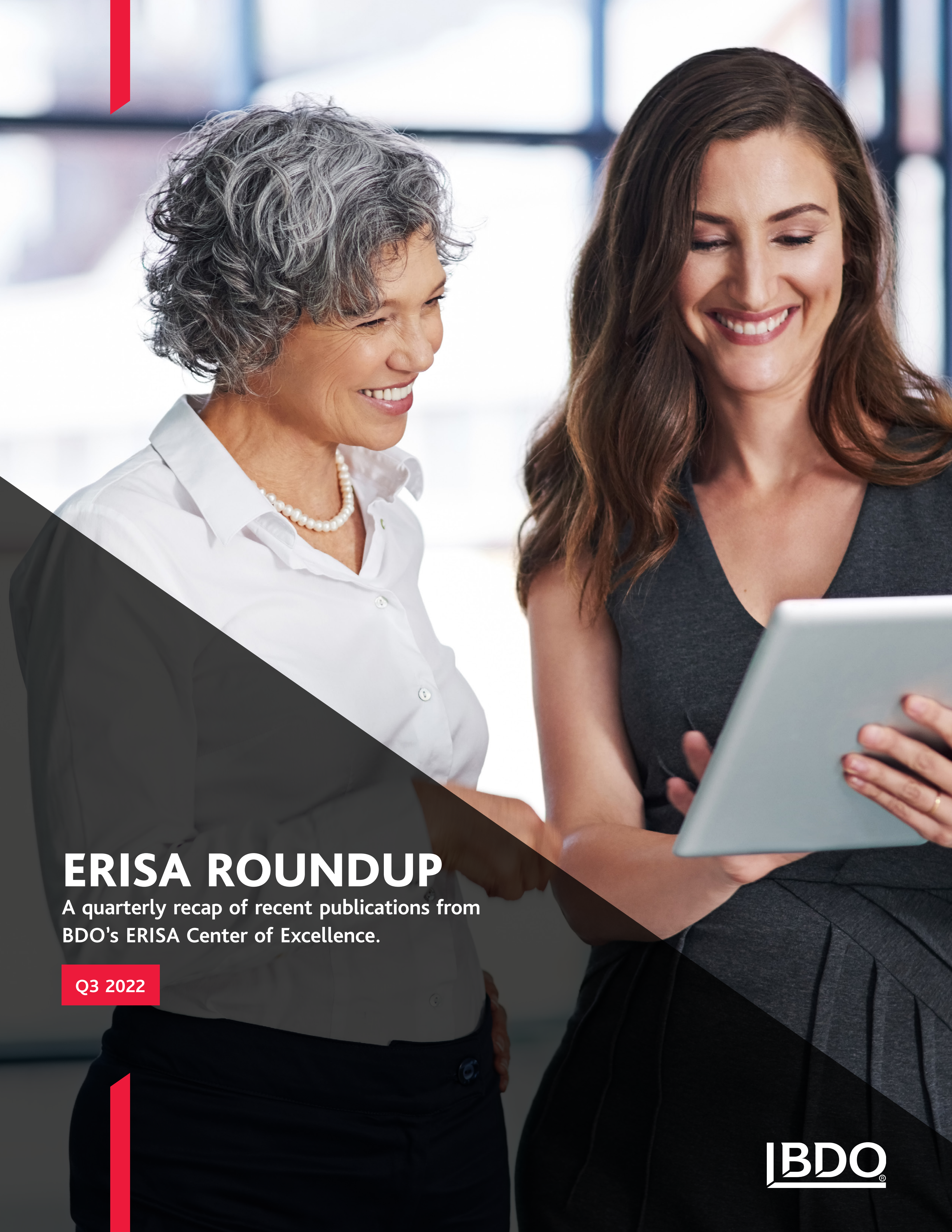


ERISA ROUNDUP

A quarterly recap of recent publications from BDO's ERISA Center of Excellence.

Q3 2022

BDO

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

As the leaves change colors and we head into Fall, it is the perfect time to take stock of those retirement plan-related tasks that you may have been putting off during the plan audit and Form 5500 filing rush.

In this edition of our ERISA Roundup, we explore the benefits of clear communications during open enrollment and the importance of monitoring employee deferral limits before the end of the year. We dive into cryptocurrency investments and the impact this may have on retirement plans. Updates from the IRS and PBGC on recent program changes and amendment deadlines.

Staying current on ERISA topics like these is simplified with BDO as we invite you to follow along with our regular insights at www.bdo.com/erisa and our podcast series *BDO Talks ERISA*.

Wishing you all the best,

BETH GARNER
National Practice Leader, EBP and ERISA Services

BDO's ERISA Center of Excellence is your source for insights on emerging regulations, industry trends, current topics, and more. Visit us at www.bdo.com/erisa or follow along on Twitter: @BDO_USA and #BDOERISA.

In This Issue

www.bdo.com/erisa

2022 Deadlines and Important Dates

Sponsors of defined benefit and defined contribution plans should keep the following deadlines and other important dates in mind as they work toward ensuring compliance for their plans in 2022. Dates assume a calendar year plan.

OCTOBER

- **1** / Distribution: Annual notices to participants must be given no earlier than Oct. 1 and no later than Dec 1, including 401(k) Plan Safe Harbor Match Notice, Automatic Contribution Arrangement Safe Harbor, Automatic Enrollment and qualified default investment alternative.
- **17** / File PBGC Form 10, by Oct 17, if a defined benefit plan (of any size) 1) missed its Sept 15 required contribution, 2) the contribution is still unpaid as of Oct 15, 3) the contribution could not have been met with a Prefunding or Carryover Balance election and 4) a PBGC Form 200 was not already filed for the same event.
- **15** / Oct 15, possible third quarter 2022 contribution due for defined benefit pension plans.
- **17** / Action: Oct. 17 is the extended deadline for filing Form 5500 and Form 8955-SSA.
- **17** / Action: Oct. 17 is the extended deadline for filing individual and C-Corp tax returns.
- **17** / Fund: If an extension was filed, Oct. 17 is the deadline to fund employer contributions for C-Corporations and Sole Proprietors.
- **17** / Action: Oct. 17, multi-employer defined benefit plans file PBGC Comprehensive Premium document and pay $32 per participant flat-rate premium.
- **17** / Action: Oct. 17 to open a Simplified Employee Pension (SEP) plan for extended tax filers.
- **25** / Action: File PBGC Form 200 by Oct. 25, if plan sponsor of a single-employer defined benefit plan does not make the Oct. 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **31** / Distribution: Single-employer defined benefit plans that are less than 60% funded must inform participants by October 31 or 30 days after the benefit restriction is determined.

NOVEMBER

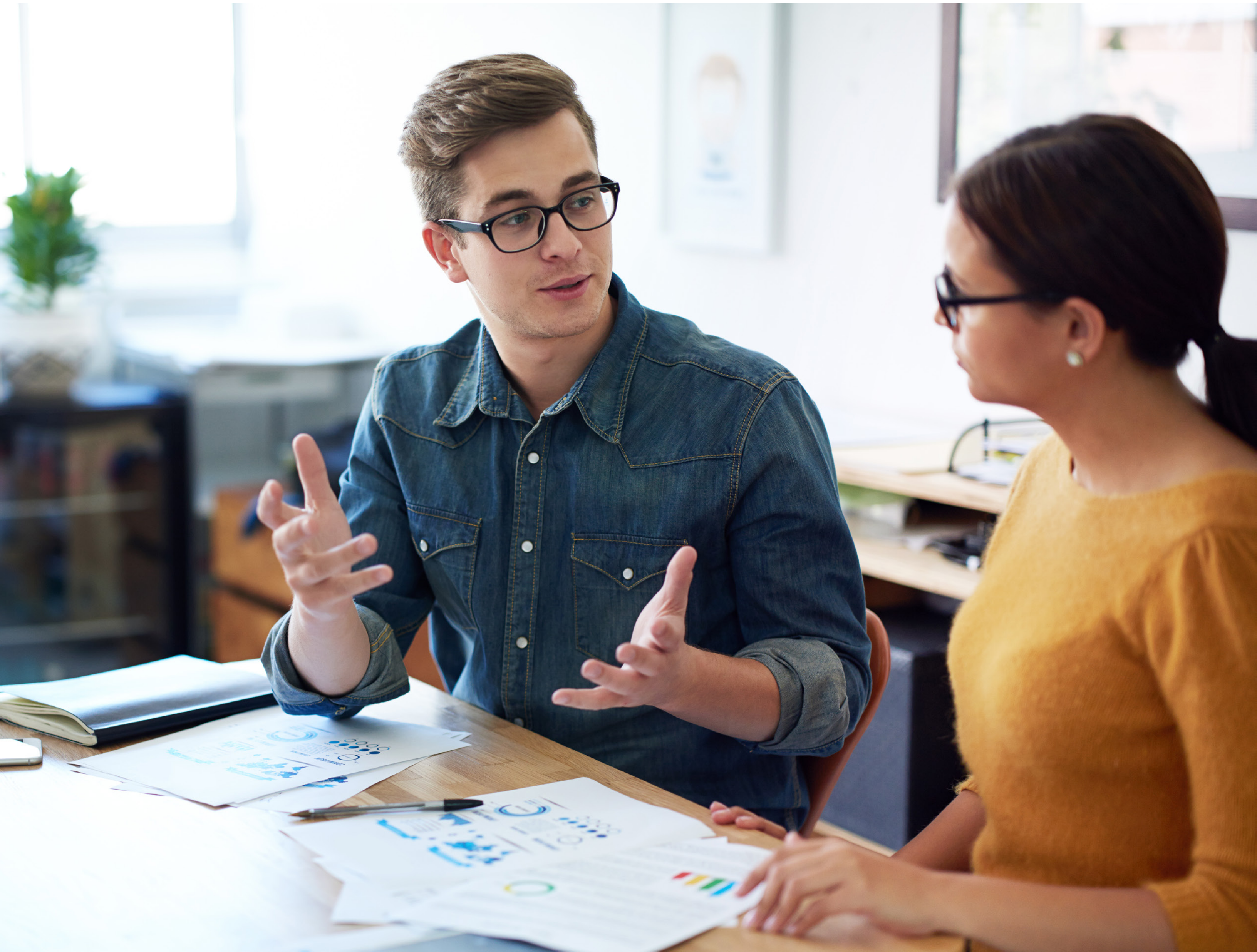
- **15** / File PBGC Form 10, by Nov 15, if a defined benefit plan with >100 participants 1) missed its Oct 15 required contribution, 2) the contribution is still unpaid as of Nov 15, 3) the contribution could not have been met with a Prefunding or Carryover Balance election and 4) a PBGC Form 200 was not already filed for the same event.

DECEMBER

- **1** / Distribution: Annual Participant notices must be distributed by Dec. 1. These include: 401(k) Plan Safe Harbor Match Notice, Automatic Contribution Arrangement Safe Harbor, Automatic Enrollment and qualified default investment alternative notices.
- **15** / Action: Dec. 15 is the extended deadline to distribute Summary Annual Report (SAR).
- **31** / Action: Dec. 31 is the final deadline to process corrective distributions for failed ADP/ACP testing; a 10% excise tax may apply.
- **31** / Action: Amendments to change traditional 401(k) to Safe Harbor design, remove Safe Harbor feature or change certain discretionary modifications must be completed by Dec. 31. Amendments to change to Safe Harbor nonelective design must be completed by Dec 1 of given plan year for 3% or by Dec 31 of the following year for 4% contribution level.
- **31** / Action: Plan sponsors must amend plan documents by Dec. 31 for any discretionary changes made during the year.
- **31** / Action: Ongoing RMDs for 5% business owners and terminated participants must be completed by Dec. 31.

In addition to those important deadlines and dates on the previous page, plan sponsors should be aware of the contribution plan limits and other rolling notices for 2022:

- Employee salary deferral limits for 401(k), 403(b) and 457 plans will be $20,500. Age 50 catch-up contribution limit remains at $6,500.
- Traditional and Roth Individual Retirement Account contribution limit will be $6,000. catch-up contributions for participants age 50 and over is $1,000.
- Limitation for the annual benefit under a defined benefit plan under Section 415(b)(1)(A) will be $245,000.
- The dollar amount used to define "highly compensated employee" under Section 414(q)(1)(B) will be $135,000.
- Newly eligible employees must receive a Summary Plan Description (SPD) within 90 days after becoming covered by the plan.
- Provide quarterly statements and fee information to defined contribution plan participants.
- Provide annual lifetime income illustrations to defined contribution plan participants.



Stay Up to Date with Our Podcast, BDO Talks ERISA

Our ERISA Center of Excellence releases a monthly podcast — BDO Talks ERISA! This series covers best practices around all things ERISA and any other HR-related topics, including:

- How to avoid common compliance issues.
- How to navigate the ins-and-outs of ERISA's fiduciary provisions.
- Our own experiences working for BDO's ERISA Services group.
- A deeper dive into the insights we share through our BDO ERISA Center of Excellence.

Listen to new episodes at BDO.com/BDOTalksERISA or subscribe on Apple Podcast or Spotify. If you have suggestions for future topics or have a question for us to answer, send an email to BDOTalksERISA@bdo.com.

RECENT EPISODES

Episode 21: SECURE 2.0, RISE & SHINE Act, and Your Retirement Savings Plan

Host Beth Garner talks to Norma Sharara, Managing Director, National Tax Office — Compensation & Benefits at BDO regarding the SECURE 2.0 Act of the House, the RISE & Shine Act of the Senate HELP Committee, and the as-yet-unnamed bill from the Senate Finance Committee, all aiming to supply greater access to workplace retirement. Beth and Norma discuss some of the provisions of each bill and how they differ, including a SECURE 2.0 provision for student loan debt.

LISTEN TO EPISODE 21 NOW

Episode 22: Cryptocurrency – Understanding the Basics (Part 1)

Are you thinking about offering cryptocurrency in your retirement plan? Learn the basics. Co-hosts Beth Garner and Joanne Szupka sit down with Sterling Ingui, who is a Product Area Leader for Next Gen Retirement in Workplace Investing and NC Regional Leader at Fidelity Investments. They discuss the fundamentals of cryptocurrencies, including the definition and different types available, as well as the interesting history behind this digital currency.

LISTEN TO EPISODE 22 NOW

Episode 23: Cryptocurrency – What Plan Sponsors Should Know (Part 2)

Continuing our two-part series, co-hosts Beth Garner and Joanne Szupka is joined by Dave Gray, who is on the Workplace Investing Executive Management Team and serves as the Head of Workplace Retirement Platforms, Workplace Investing for Fidelity, along with Sterling Ingui, who is a Product Area Leader for Next Gen Retirement in Workplace Investing and NC Regional Leader at Fidelity Investments. Get answers to the key questions plan sponsors might have when considering cryptocurrency as 401(k) investment options.

LISTEN TO EPISODE 23 NOW

The Great Regret Urges Plan Sponsors to Review Their Benefits Lineup

We have all heard of the Great Resignation, a term coined to describe the millions of employees that left their jobs since the onset of the COVID pandemic in 2020. Many employees who moved on to another job are having second thoughts about their decision — a new phenomenon that is being referred to as the Great Regret.

Nearly three quarters of respondents to a **survey conducted by Muse**, a career website, said their new jobs weren't what they expected. This "quitter's remorse" is also affecting employers, who are currently showing **11.4 million job openings** nationwide according to the Bureau of Labor Statistics.

The current employee-driven jobs market may be unsettling, but it presents an opportunity for plan sponsors to hone their benefits offerings and improve participant communications to become an employer of choice for persnickety job seekers.

WHY EMPLOYEES STAY OR LEAVE

While about 40% of employees say they plan to leave their jobs within the next year according to a **recent survey conducted by talent acquisition firm, Leveler**, Gen Z workers are leading that drive, as 65% plan to leave for other opportunities. Factors that tend to keep employees at their current job include salary and bonus levels that are too good to leave; paid time off and flexibility; and the potential for upward mobility.

Leveler found that internal mobility is a particularly important factor in retaining talent. One-third of employees interested in a new role said they would trade a pay cut for upward mobility, and 61% said they would leave if the company did not offer opportunities for promotion.

The Muse survey also found that about one-quarter of unhappy workers felt they hadn't thoroughly evaluated the pros and cons before taking a new job. Boomerang employees — those who leave a company but later return — appear to be on the rise. **LinkedIn recently reported** approximately 4.3% of employees who leave a job end up coming back. Additionally, according to LinkedIn, it takes an average of 17 months for an employee to come back to his or her original job, but many return in less than a year.

GETTING CREATIVE WITH BENEFITS

Employers expect to have employment issues over the next several years, and see their defined contribution plan as an important tool to attract and retain talent. Companies that boost flexibility and choice in their benefit plans may separate themselves from the competition and better meet employees' needs in a historically tight labor environment. Some of the leading strategies include digital tools to help employees with budgeting and spending through their financial wellness programs and targeted communication to support program changes.

BDO INSIGHT: Do your research and communicate effectively

This year's environment is probably the toughest labor market we have seen in several decades. It is critical that plan sponsors have a detailed understanding of their employee demographics in order to offer the right combination of salary, benefits, and perks. Newer employees often lump perks and benefits together, and many fail to realize that things like free snacks in the break room are perks while the ability to redirect 401(k) contributions to student loan repayments is a benefit. Targeted and frequent communications can be an effective way to help specific segments of your employee population better understand your offerings.

Your BDO representative can help you think strategically about your workforce, its unique benefits needs, and your lineup of offerings to help attract and retain the right talent.

Plan Sponsor Alert: Cryptocurrency Investments and the DOL's Warning

Cryptocurrencies and the volatility of the digital currency market have garnered a lot of attention in the retirement plan industry over the past few years. The Department of Labor (DOL) has issued a stern warning about cryptocurrencies on investment menus and brokerage platforms within 401(k) plans. Since the release of the warning, third-party plan providers have responded with differing stances on the guidance released. Some 401(k) providers believe that the DOL has gone too far.

The DOL's strongly worded compliance release may cause plan sponsors to rethink cryptocurrencies as investment options and the use of brokerage windows in general.

INTRO TO CRYPTOCURRENCIES AND THE DOL'S WARNING

A cryptocurrency is a digital or virtual currency that uses cryptography to secure transactions. Bitcoin, launched in 2008, was the first digital currency, but today there are thousands of digital coins used throughout the world.

In its **Compliance Assistance Release No. 2022-01 (CAR 2022-01)**, the DOL said it has serious concerns about cryptocurrencies in 401(k) plans and cautioned plan fiduciaries to exercise "extreme care" before adding a cryptocurrency option to investment menus or brokerage windows. The DOL listed five areas that poses serious risks and challenges to participants' retirement accounts:

- Cryptocurrency investments are highly speculative, as warned by the Securities and Exchange Commission (SEC).
- It can be difficult for participants — even sophisticated ones — to evaluate cryptocurrencies and separate facts from fad.
- Cryptocurrencies are typically held in in a digital wallet (not a trust or custodial account), which may cause cybersecurity concerns.
- Cryptocurrency valuations may be unreliable and difficult to understand.
- Rules and regulations governing cryptocurrencies are evolving, which may cause compliance challenges.

As a result of these concerns, the DOL's Employee Benefits Security Administration (EBSA) stated it will conduct an investigative program targeting plans offering cryptocurrencies and expects to take action to protect plan participants and beneficiaries.

The DOL guidance specifically called out cryptocurrency investments available on brokerage windows. The DOL stated that "plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks."

As part of the DOL's fiscal year 2023 budget request, Labor Secretary Marty Walsh mentioned the DOL is open to a rule that would regulate cryptocurrency in retirement accounts.

MIXED RESPONSE FROM PLAN SPONSORS AND RECORDKEEPERS

Shortly after the DOL released its guidance, more than half (57%) of plan sponsors said they would never consider cryptocurrency as a viable investment option, according to a **poll conducted by the Plan Sponsor Council of America**. An additional 33% of plan sponsors stated this guidance reaffirmed the concerns they already had regarding cryptocurrency as a prudent investment option in a retirement plan.

However, weeks later, Fidelity — the nation's largest recordkeeper with more than $1 trillion in assets — became the **first platform to announce** that it would offer employers the ability to let participants invest a portion of their retirement savings in Bitcoin through their core 401(k) plan investment lineup. Fidelity said that employees "who are comfortable with the risks and volatility of cryptocurrency" would have access to educational materials to help them make informed decisions. Fidelity currently plans to permit employers to allow Bitcoin up to a ceiling of 20%.

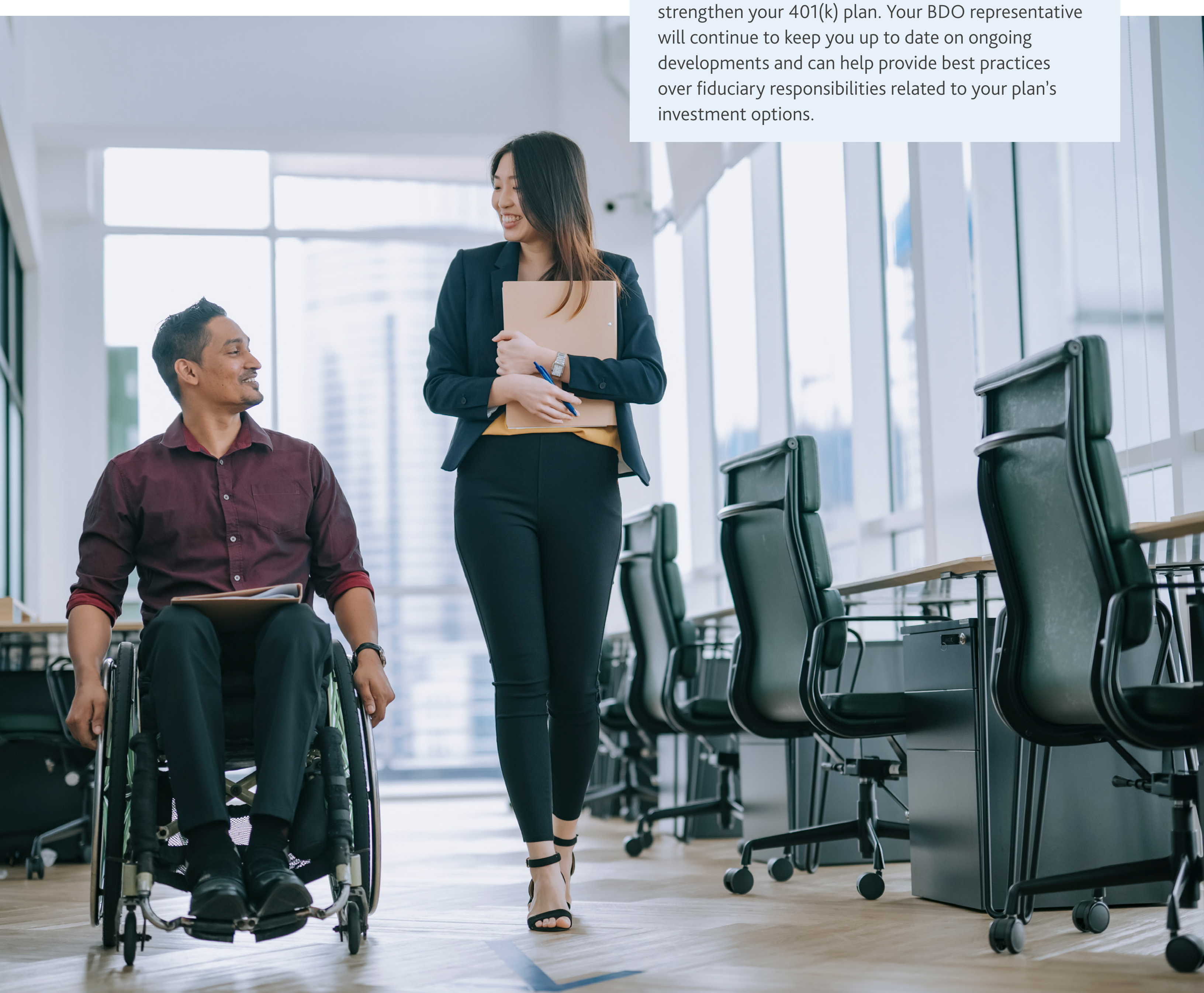
Others believe the DOL has overreached with CAR 2022-01. In a **letter signed by the U.S. Chamber of Commerce**, they noted that in addition to the release effectively prohibiting certain investments, the DOL is also effectively mandating fiduciary responsibility for brokerage window investments. Under current regulations, ERISA fiduciaries are not obligated to directly monitor or evaluate brokerage window investment options. In fact, most brokerage windows are not designed to monitor or block specific investments.

In June 2022, ForUsAll Inc., a plan provider, sued the DOL, stating the DOL had taken its guidance too far and effectively has implemented a ban against certain investments.

BDO INSIGHT: Focus on due diligence for investments

Developments regarding cryptocurrency in the 401(k) plan world are certain to occur given the popularity and interest by companies and individuals. In the meantime, the DOL's language is so strongly worded that plan sponsors would be wise to use extreme care when considering adding a cryptocurrency option to a plan.

Plan sponsors should take the conflicting messages in the new guidance as an opportunity to connect with plan participants about the plan's current investment options. Regardless of your stance on cryptocurrencies, staying connected to your plan participants helps strengthen your 401(k) plan. Your BDO representative will continue to keep you up to date on ongoing developments and can help provide best practices over fiduciary responsibilities related to your plan's investment options.



Plan Sponsor Alert: IRS 90-Day Pre-Examination Pilot Program

The Internal Revenue Service has provided selected qualified retirement plans a chance to inspect and potentially self-correct any compliance issues through a new 90-day pre-examination pilot program announced in the June 3 Employee Plans newsletter. The agency says the pilot program's goal is to reduce taxpayer burden by lowering the number of full-scope examinations.

IRS PRE-EXAMINATION PROGRAM

The program gives plan sponsors 90 days to review the plan's document and operations to determine whether they comply with current tax law requirements. The IRS reportedly will inform the letter recipient about specific issues to focus on and may offer reduced fines for completing the request. Plan sponsors who don't respond to the IRS query within the 90-day period will trigger an automatic examination by the agency.

WHAT TO DO IF YOUR PLAN IS SELECTED

Plan sponsors who receive a letter should read it carefully as soon as possible. The IRS is keenly focused on compliance with plan documents; thus, plan sponsors should notify any service providers that may help gather information and run tests, such as auditors, plan counselors, third-party administrators and trustees/custodians.

Plan sponsors should treat this request just like a regular examination. It is not unusual for plan sponsors to outsource many of the plan's functions, and the sponsor may have questions about whether the plan is in compliance. Therefore, contacting service providers as soon as possible can be very helpful to find the right documents and run the proper tests.

REMEDIES FOR ERRORS

If plan sponsors discover errors, the IRS recommends reviewing the Employee Plans Compliance Resolution System (ECPRS) under Revenue Procedure 2021-30 to determine if any errors may be self-corrected. BDO has written extensively about the EPCRS program in previous articles. In short, the EPCRS program consists of three tiers of correction: the Self-Correction Program (SCP), the Voluntary Correction Program (VCP) and the Audit Closing Agreement Program (CAP). The SCP and the VCP are user-initiated programs, whereas the Audit CAP applies to plans undergoing an examination initiated by the IRS.

If they cannot correct errors through the SCP, plan sponsors can report problems voluntarily to the IRS and request a closing agreement.

In exchange for the information, the IRS will only impose fines based on the VCP fee structure, which caps out at $3,500. This can represent significant savings to plan sponsors, who might otherwise be subject to the Audit CAP penalties.

It is important to note that once the IRS initiates an examination, plan sponsors can no longer use the self-correction or voluntary programs.

Plan sponsors should document their process — explain the errors and show the steps used to correct any issues. Additional documentation that helps clarify what happened may provide valuable context for the IRS in understanding the situation. If the agency disagrees with your findings, the IRS may conduct a limited or full-scope examination.

UNANSWERED QUESTIONS

The IRS had not issued further information on the pre-examination program as of this publication date. Notifications have already gone out, so if you have not received one, there is a strong possibility that you won't receive one. The agency has not provided any information about how many notices were sent, who or what types and sizes of plans received them or whether the program will continue throughout the year.

BDO INSIGHT: Pay careful attention to notices

These days, it is easy to overlook what gets delivered through "snail mail," but that is exactly how the IRS distributes its notices. It is critical to carefully monitor your plan's mail to ensure you are aware of any notices you may receive.

While 90 days may seem like plenty of time to respond, the deadline is approaching soon. Plan sponsors with pre-approved plans are already working on restating their plan documents, and others are working on end-of-year amendments to comply with recent legislative changes. Plan sponsors who have questions on the steps they should take regarding this 90-day pre-examination pilot program should reach out to their BDO representative as soon as possible.

Plan Sponsor Alert: Avoid Employee Deferral Limit Excesses

The Internal Revenue Service (IRS) determines how much 401(k) plan participants can defer into their plan accounts, but many plan participants sometimes fail to fully understand or keep these deferral limits top of mind. Participants exceed 401(k) deferral limits for a variety of reasons. While the filing deadline for on-time tax filers has passed for 2022, now is a good time to start discussing deferral limits so plan sponsors and participants can avoid any last-minute scrambling to correct issues in 2023.

2022 DEFERRAL LIMITS

Each year, the IRS sets limits on how much plan participants can defer into their 401(k) plan accounts. In 2022, the limit on employee elective deferrals for all qualified 401(k) plans is $20,500 — a $1,000 increase from 2021. Participants aged 50 or older can add a catch-up contribution of up to $6,500 for a total deferral limit of $27,000.

The limit on employee elective deferrals to a SIMPLE 401(k) is $14,000 in 2022, an increase of $500 from 2021. Participants aged 50 or over in a SIMPLE 401(k) can make a catch-up contribution of up to $3,000 in 2022.

The total defined contribution limit for 2022, which includes employer contributions, is set at $61,000, or $67,500 for eligible participants taking advantage of catch-up contributions.

COMMON CAUSES OF DEFERRAL LIMIT ISSUES

Pandemic-related workforce issues have continued to disrupt organizations and may contribute to the risk that participants may exceed deferral limits. Common reasons for employees exceeding deferral limits include the following:

- Many participants exceed deferral limits simply because they aren't aware of the rules. For example, some employees may choose to contribute a percentage of their pay that automatically places them over the limit.
- Participants may leave a company, join another company, and fail to understand that their deferral contributions made to both plans put them over the limit.
- When organizations merge or are acquired, participants may be unaware of resulting changes, and service providers may not consolidate participants properly.
- Payroll vendors may not cap limits correctly.
- When an employee receives a bonus, a deferral percentage may be automatically deducted and directly deposited into the 401(k) account.

CONSEQUENCES OF EXCEEDING DEFERRAL LIMITS

Ultimately, it is the participant's responsibility to understand and abide by the rules on deferral limits. But employers play an important role in educating participants to help prevent issues and correct an excess should the situation arise.

When an error occurs, the participant first needs to determine where the excess occurred — especially if multiple accounts are involved. Once the participant determines this, the plan sponsor must distribute the excess deferral to the employee and report it as taxable income in the year it is deferred and the year it is distributed on Form 1099-R. The IRS provides examples and more details in its 401(k) Plan Fix-It Guide.

If a participant exceeds the deferral limit and the mistake is corrected prior to April 15 of the year following the year of deferral, there is no early withdrawal penalty. However, if the participant doesn't fix the error before filing his or her individual tax return, the participant will have to pay a "double tax" — once in the year they over-contributed, and once in the year the cash was taken from the plan. Late withdrawals may also be subject to a 10% penalty tax, a 20% withholding tax and require special spousal consent. If the excess contribution is made as a Roth deferral, which is funded with after-tax dollars, the participant may have to pay taxes on the associated earnings.

Employers can get nicked, too. If the excess contributions are not taken out by the required due date, plans can be disqualified and would need to go through the Employee Plans Compliance Resolution System (EPCRS), which is explained in more detail in this BDO article.

AVOIDING OVERAGES ALTOGETHER

Financial planning can be challenging even for the most attentive employees. For this reason, it can be helpful to over-communicate about deferral limits, including on election forms, standard plan notices, plan statements, and regular employee correspondence. Some participants can change their deferral election based on the provisions set in the plan document, so having constant reminders can help them stay compliant.

Better communication with service providers can also help. Plan sponsors should check in with service providers at least annually to ensure that the proper cap is in place — especially in years when deferral limits change. Plan sponsors can also work with service providers to alert participants when they are approaching a deferral limit threshold.

BDO INSIGHT: Set limits to IRS standards

Plan sponsors are permitted to use deferral thresholds that are lower than what the IRS prescribes. For example, plan sponsors may set a threshold of 85% of an employee's pay as a contribution ceiling in the plan document. But even when this sort of threshold is imposed, some employees can still cross the IRS limit — for example, if 85% of an entire salary is contributed. Because it is so difficult to foresee every situation, it is typically best to stick to the IRS thresholds and instead focus your efforts on areas like better communication with plan participants.

Your BDO representative is available to help explain contribution limits and how to best manage your specific situation.

Plan Sponsor Alert: Considerations for Clear Communication During Open Enrollment

In today's labor market, benefits can be a valuable tool for employers to retain talent. Employers may feel that they are preparing employees for open enrollment by only offering the necessary information right before the open enrollment process. But a **recent report from the Life Insurance Marketing and Research Association (LIMRA)** showed a significant lack of understanding of the benefits being offered. 30% of employees said they didn't know whether their employers offered major insurance benefits like medical, dental, and vision, while more than half were uncertain whether employers offered any retirement benefits.

LET THE COMMUNICATION CIRCLE BE UNBROKEN

The LIMRA study showed that 60% of employees felt employer communications on benefits were ineffective. Employers should think about the open enrollment process as a year-long communications rather than an isolated need in the weeks ahead of open enrollment.

There are so many fine-point details to the layers of benefits, detailed communications throughout the year can help employees build knowledge and confidence in their benefits. In fact, 70% of respondents said they want benefits information year-round. Study results also have shown that providing more frequent communications can increase understanding of benefits by 10 to 30 percentage points.

If your open enrollment period is coming up in a few weeks, it is not too late to send simple, informational communications on key features of your open enrollment process.

FLEXIBLE ENROLLMENT OPTIONS FOR YOUR EMPLOYEES

While the pandemic did not invent virtual enrollment, it did force many providers to broaden and strengthen the online process. Today, employers have expanded options for the enrollment process to best suit the needs of their workforce.

- **In-Person:** In-person enrollment may work best if your company plans to have open enrollment meetings or a benefits fair. Studies have shown that employees highly benefit from one-on-one meetings, so check with your service providers to review your options. An added benefit of in-person enrollment is that, for some companies, it gives employees an opportunity to reconnect after working remotely during the pandemic.
- **Online:** One of the largest advantages of online enrollment is that employees can invite family members to join the benefits education and selection process. In addition, mental health and other areas that may be seen as taboo subjects can be explained in more comfortable, private settings. Apps with interactive learning tools, on-demand videos, and other individualized features can make online open enrollment easier.
- **Hybrid:** Flexible work arrangements have required employers to offer a combination of in-person and online open enrollment sessions. This mix may seem complicated, but those who mirror their options online and in person tend to be more successful. Employers using this process should build in more time for employees to enroll.

No matter which option(s) your company chooses, employers should monitor the effectiveness of these options to see what works best for your workforce and improve the process for the following year.

KEEP THINGS SIMPLE — NO MATTER WHICH METHOD OF COMMUNICATION IS CHOSEN

Open enrollment can be stressful, so the easier and more accessible you make your communications, the better the process will be for everyone involved. In general, employees need to know which coverage levels best fit their needs as well as the total costs and specific rules that go along with the options they choose. The same goes for non-insurance benefits, such as mental health and tuition assistance. Doing the math for employees and providing examples or illustrations of various scenarios can help make selections easier to understand.

Employees also should seek to keep all required informational notices easy to understand. Notices would include Summary Plan Description (SPD), Plan Highlights, Enrollment Forms or similar materials. Annual limits — such as spending to meet deductibles or contribution limits to 401(k)s — should be readily available to your employees, as should deadlines for submission and other enrollment requirements.

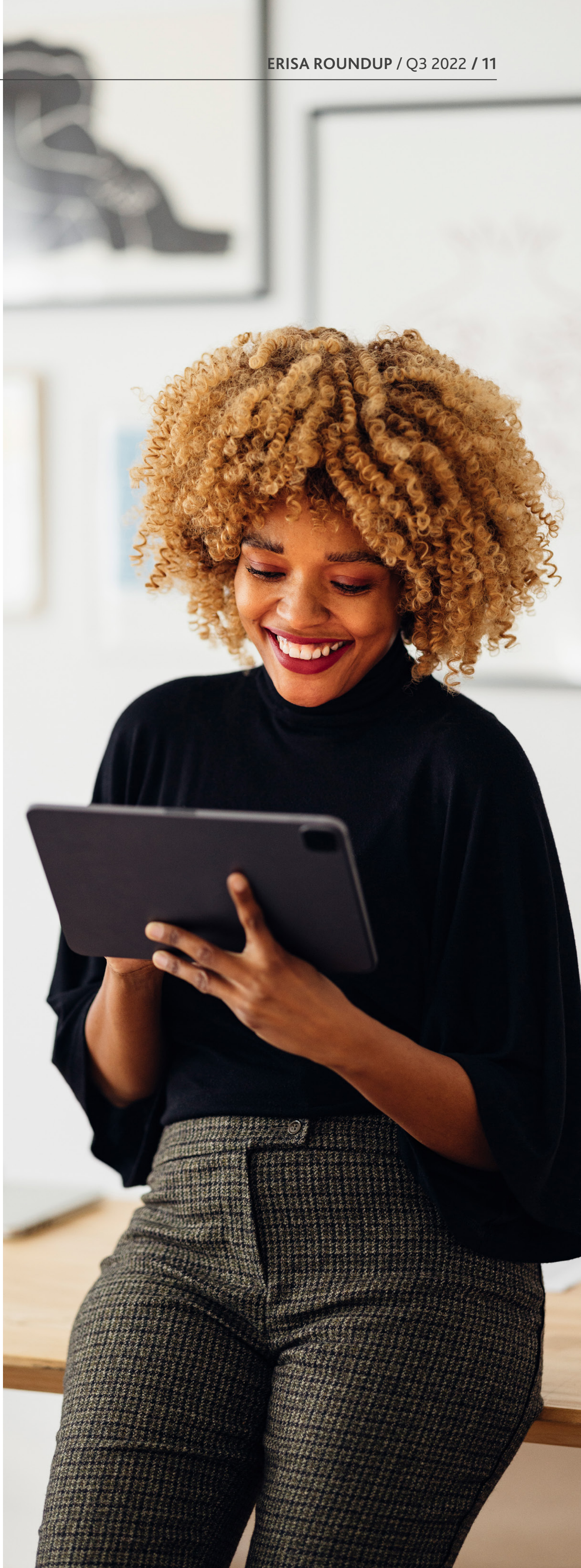
In addition, America's workforce is diverse in language and culture. Employers with these demographics should consider translating materials — both online and in-person — and clearly communicating that this service is available to employees.

When it comes to translating documents, the **Department of Labor (DOL) provides guidance** for the style and format for SPDs that can be helpful in crafting information for open enrollment. Plan sponsors should make it well-known that a non-English version of benefits information is available and help employees understand their benefits. Note that it is important to include a disclaimer stating that in the event of any conflict between the English and translated version, the English version will be the default information.

BDO INSIGHT: Effective Communication

With more concise and frequent communication, employers can improve the open enrollment process as well as their ability to retain the right employees.

If you or your team have any questions about improving your open enrollment communication process, your BDO representative is available to help.



Plan Sponsor Alert: PBGC Finalizes Rules to Assist Failing Multiemployer Plans

The Pension Benefit Guaranty Corporation (PBGC) on July 6, 2022, announced a final rule implementing changes to the Special Financial Assistance (SFA) Program for financially troubled multiemployer pension plans. The final rule includes significant developments and amendments to the interim final rule (IFR).

A BRIEF HISTORY ON MULTIEMPLOYER PLANS

The PBGC has experienced solvency challenges since its inception in 1974. Within six years of the agency's creation, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 to help shore up the PBGC's solvency issues. Congress again tried to stabilize multiemployer plans in 2014 by allowing sponsors whose plans were projected to run out of money to cut benefits under the Multiemployer Pension Reform Act of 2014 (MRPA). Even after this, the PBGC projected its multiemployer insurance program would go bankrupt by 2026.

In July 2022, the PBGC took a different approach when issuing its **final rule** on a multibillion-dollar financial assistance package to shore up funding issues and the future of the agency's insurance program covering multiemployer plans. The SFA program **went into effect on an interim basis** as part of the $1.9 trillion American Rescue Plan Act passed in March 2021.

Through the SFA program, the PBGC expects to grant between $74 billion and $91 billion to multiemployer plans that meet one of four conditions:

- The plan is in critical and declining status from January 2020 to December 2022.
- The plan suspended benefits under the MPRA by March 11, 2021.
- The plan is in critical status, is less than 40% funded and has more inactive than active participants.
- The plan became insolvent after Dec. 16, 2014, but as of March 11, 2021, is still insolvent but not terminated.

The SFA program, which became effective on Aug. 8, 2022, is open only to qualifying multiemployer plans, and funding is restricted to paying benefits and administrative expenses. All SFA program assistance and earnings must be kept separate from other plan assets, and no repayment is required. Plans receiving assistance have specific reporting requirements, including an annual statement showing compliance with the final rules. The PBGC can audit multiemployer plans that receive SFA funding.

As of July 6, the PBGC had approved more than $6.7 billion to plans covering 127,000 workers and retirees. Plans that received funding during the interim rule period but are eligible for additional funding under the final conditions can resubmit an application.

SIGNIFICANT CHANGES TO THE SFA PROGRAM FOLLOWING INTERIM RULE

The PBGC received more than 100 public comments after issuing the interim rule in July 2021 and made several significant changes in response to those comments.

- **Two interest rate assumptions to calculate SFA and non-SFA assets:** The interim rule required only one interest rate assumption for all assets, which did not consider that the SFA funds had specific, conservative investment requirements. The final rule separates the assets and allows plans to use more realistic interest rates to project returns on all investments.
- **Investing SFA assets:** The final rule allows plans to invest up to 33% of SFA assets in "return-seeking investments," such as publicly traded common stock and equity funds. Up to 67% will be restricted to high-quality fixed income investments.
- **MPRA plans:** The interim rule would have forced plans to choose between keeping reduced benefits to maintain solvency through 2051 or taking SFA funding and restoring benefits levels but risking future insolvency. The final rule allows plans that cut benefits under the MPRA to use a three-step revised methodology to determine the amount of funding they can take. Now, the rule is set up to fund these plans sufficiently to restore the reduced benefits and remain solvent through 2051.
- **Withdrawal liability:** Employers who exit multiemployer plans must recoup those plans with a "withdrawal liability," representing their share of the total unfunded benefits, so that remaining plan sponsors are not burdened with the exiting employer's unfunded benefits. Under the final SFA rule, an exiting employer will not immediately benefit from an SFA infusion when determining its withdrawal liabilities. Plans will instead phase SFA funding into plan assets over 10 years when determining unfunded vested benefits. The interim rule would have otherwise immediately included SFA funding as plan assets, lowering withdrawal liabilities on day 1 for exiting employers. The PBGC has requested public comments on this provision of the rule.
- **Merged plans:** The Internal Revenue Service (IRS) imposes special conditions for a plan that merges with another plan that has received SFA funds. In **Revenue Ruling 2022-13**, the IRS considered whether the ongoing plan is considered to be in critical status when a multiemployer plan that received SFA funds merges with another multiemployer plan that did not receive SFA assistance, and the non-SFA plan is considered the ongoing plan. In that case, the IRS said the ongoing plan should not be considered to be in critical status, but it should comply with the conditions used to qualify for SFA funding.

BDO INSIGHT: Do your research, but get help if necessary

With a 57-page final rule, plan sponsors are expected to have questions, so the PBGC has set up an SFA website to help clarify issues. This is a lot of information to digest, and every situation is different. If you would like to discuss your plan's situation, your BDO representative is available to help.

Why HR Due Diligence is an Important Step in a Transaction

'Workforce in Transactions' or 'Human Resources Due Diligence' evokes different ideas for different people. We often get asked "what is Workforce in Transactions?" and "why do Human Resources Due Diligence?" This article will aim to cover both questions, including our top eight reasons why organizations should perform HR Due Diligence.

WHAT IS WORKFORCE IN TRANSACTIONS?

Breaking it down, a 'transaction' is any sort of merger, acquisition, carve-out, spin-off, major restructuring, etc. 'Workforce' or 'Human Capital' refers to the people related to the organization (employees, contractors, consultants, founders, owners, etc.), the renumeration they receive (equity, cash compensation, benefits, other entitlements, etc.) and the ways the organization supports these people (HR function, HR systems, organizational design, communications, change management culture, etc.). In most organizations, the people costs are some of the highest costs an organization has — which presents both opportunity and risk. Exploring the opportunity and risk ahead of a sale is the due diligence process which is structured and methodical. It involves reviewing data on the organization and its people, speaking with management and performing different analyses depending on the context of the situation. Findings are then summarized and incorporated into the financial adjustments and purchase agreement considerations. These workforce-related financial adjustments often have an impact on the overall purchase price as, typically, purchase price is a multiple of adjusted earnings.

8 REASONS TO DO HR DUE DILIGENCE

#1 - Quantify the people cost of doing business

The people costs of a business are usually some of the largest expenses a business has, including: the way an organization operates (with employees, gig workers, people located in the U.S. or abroad), how employees are paid (at market, above or below), plus any **employee benefits** and/or long-term incentives. Understanding the people structure and strategy, including the day-to-day nuances of the business such as turnover, growth, culture and outsourcing approach, all can translate into meaningful adjustments to earnings or debt-like adjustments which is often how the transaction purchase price is determined.

#2 - Lay the groundwork for achieving your deal thesis

More than ever, people and culture are being recognized as drivers in deal success or failure. Frequently, the talent at the organization is a key reason to do the transaction. Articulating the main reasons for doing a deal and holding those reasons up against the current strategy (or lack thereof) within each functional area often results in surprising findings. With a nod to the saying "what got you here won't get you there," buyers not considering the intersection of people and the deal strategy are often leaving money on the table.

#3 - Anticipate any retention risk

Often early in a transaction buyers won't know if they want to keep the leadership team. This is something that needs to be diligenced, but, understanding if the leadership team wants to stay and their individual payouts upon the proposed transaction should not be overlooked. We've worked on multiple transactions where the founder was a critical component of the business but wasn't forthcoming about their proceeds, which can be challenging for go-forward planning. Often, if leadership is critical to the go-forward business, we discuss rolling over a meaningful portion of the payout to ensure retention. When leadership won't commit within these discussions, a buyer must consider if they still want the business without the leader(s). We've seen cases where this is yes and other times where, for example, the proceeds of 43x current CEO pay actually "broke" the deal. Another possible scenario is if executives start departing post close and the organization needs a major image overhaul. In this case, truly, an ounce of prevention is worth many pounds of cure.

Additionally, when people throughout the organization will receive equity payouts, understanding their payout relative to their current compensation can provide an indication if retention post-close may be an issue more broadly.

#4 - Tailor communications to employees

Every deal is unique, and how employees react to the news of the deal will depend on many factors, such as the context of the deal, what will change for them, their individual experiences with deals in the past, proceeds they might receive, etc. Without a pre-signing HR diligence effort, some of these questions won't be answered, and it can be easy to miss the mark on effective communications. Further, many middle-market organizations aren't overly sophisticated in the HR/communications space, compounding the risks of rumors, unwanted turnover, lost productivity and engagement. Upon signing, buyers also have an opportunity to work with the target to craft communications related to the transaction, however, we don't often see this opportunity seized.

#5 - Uncover synergies

HR diligence includes a thorough review of the HR trial balances and, in a carve-out, cost allocations from the parent. This review often highlights areas which may be less efficient and can be optimized with little impact on the employee experience. Additionally, economies of scale and headcount reductions can be considered along with any leveraged purchasing relationships the buyer has in place. We regularly see situations where the buyer is able to justify a higher purchase price because of anticipated synergies, and this allows them to win the bid and/or get additional financing from lenders.

#6 - Identify optimization

While linked to synergies, optimization is more about value creation than value capture. BDO advises each successful deal includes a rapid HR health check upon signing. Leveraging everything learned in the diligence phase, this check can be completed in under two weeks and co-creates a customized path forward with the HR leadership of the company along with a business plan of cost and timing to achieve. Opportunities often include things like updating the performance management plan, reviewing and updating the recruiting/onboarding process to reduce early turnover, developing a more robust training program to ensure consistency while growing, etc. While optimization can be slightly more difficult to quantify, unanimously, leaders agree when people are engaged and there are processes in place, the organization will run more smoothly and achieve more.

#7 - Avoid surprises

While a deal may appear straightforward, it is extremely rare not to have some people-related findings to note. In the middle market, there may be additional challenges due to unsophisticated HR practices or founders navigating the people side of the business as they go. It's important to ask questions to uncover a toxic culture, work closely with legal counsel on employee claims such as harassment or wage/hour, review compliance risks related to Form I-9 (employee eligibility), the Affordable Care Act , Internal Revenue Code (IRC) 409A (deferred compensation payments) and 280G (golden parachute payments), as well as reconsider pension deficits, union pay increases and the like. In addition to the topics covered in #1-6, there is valuable visibility and context gained during diligence.

#8 - An ounce of prevention is worth a pound of cure

In the deal world we hear a lot of "hindsight is 20/20" and "I wish I knew then what I know now" statements, but it doesn't have to be this way. We encounter many organizations where HR was an afterthought and the result is multiple payrolls, multiple benefit programs, disparate cultures, low leadership approval, high turnover, compensation programs not meeting goals but paying out anyway, etc. During diligence many of these potential issues can be highlighted and quickly addressed, while addressing these afterwards can be messy or result in employees with deal fatigue. Additionally, ongoing changes in headcount, benefits, vendors, etc. after the deal can feel like too much uncertainty resulting in unwanted turnover. Creating a strategy early in the process and communicating that strategy to all stakeholders and employees will reduce the uncertainty and stress a transaction can create.

A wise person once said, failing to plan is planning to fail. Even a high-level review of a target's workforce can yield some surprising insights. Learn more about **BDO's Workforce in Transactions services** and **contact us** to discuss how we can support your next transaction.

IRS Extends Retirement Plan Amendment Deadlines

The IRS on August 3 announced it would extend by three years the deadline for amending retirement plans or individual retirement arrangements (IRAs) to reflect certain provisions under the SECURE Act, the Bipartisan American Miners Act of 2019 and the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Many tax-qualified retirement plans, including non-governmental 403(b) plans) and IRAs, were running short on time to make needed amendments to plan documents before the December 31, 2022, deadline to comply with recently enacted law changes. Under the new **Notice 2022-33**, plans and IRAs now have until December 31, 2025, to amend those documents to reflect the following changes:

- All the changes in the law related to retirement plans and IRAs made by the SECURE Act.
- The change lowering the age for in-service withdrawals from defined benefit plans from age 62 to age 59½ made by the Miners Act.
- The change that temporarily suspended required minimum distributions (RMDs) for 2020 under the CARES Act (but IRAs that suspended 2020 RMDs do not need amendment).

BDO INSIGHT

Notice 2022-33 does not extend all deadlines for retirement plan changes made by the CARES Act Therefore, plan year-end deadlines may still apply to some retirement plans.

The new relief provides a deadline later than December 31, 2025, only for governmental plans (including governmental 457(b) plans and 403(b) plans) maintained by public schools. That deadline is based on the legislative sessions for the plan's applicable governing body.

Before this welcome announcement, the amendment deadline for the SECURE, Miners and CARES Act changes in the law generally was the last day of the first plan year beginning on or after January 1, 2022, that is, December 31, 2022, for calendar year plans but later for fiscal year plans. The new December 31, 2025, plan amendment deadline is a fixed date that applies to all plans, regardless of whether the plan operates on a calendar year or fiscal year.

BDO INSIGHT

The December 31, 2025, plan amendment deadline applies to both union and non-union plans, even though union plans often get an extended plan amendment deadline based on the expiration date of their current collective bargaining agreement. Perhaps the IRS thought no special deadline was needed since all of the required changes are technical and would not be the subject of collective bargaining.

Anti-cutback relief is also extended until the applicable plan amendment deadline.

Regardless of when the plan is amended, it must be operated as if the amendment applied as of the original effective date of the applicable change in the law.

NO EXTENSION FOR CORONAVIRUS-RELATED DISTRIBUTIONS (CRDS) OR EXPANDED PLAN LOANS

The new amendment deadline relief does not apply to the CARES Act provisions that allowed retirement plans and IRAs to voluntarily make coronavirus-related distributions (CRDs). CRDs are aggregate distributions up to $100,000 from IRAs and defined contribution retirement plans made between January 1 and December 30, 2020 (not December 31) due to certain COVID-19-related reasons. Individuals could include the CRDs in income ratably over three years (2020, 2021 and 2022). CRDs can be repaid in full or in part to the retirement plan or IRA within three years after the date the distribution was received (i.e., repayments are allowed through the 2023 anniversary date of the distribution). If the CRD is timely repaid, the individual can file an amended federal income tax return to claim a refund of the tax attributable to the amount of the CRD that the taxpayer included in income for those years.

Likewise, the new deadline relief does not apply to retirement plans that allowed expanded plan participant loans, which were also authorized by the CARES Act. IRAs are not allowed to lend money to IRA owners, so this COVID-19 relief did not apply to IRAs. Thus, unless further guidance is issued, plans that allowed CRDs or expanded participant loans still must be amended by the last day of the first plan year beginning after January 1, 2022 (i.e., December 31, 2022, for calendar year plans).

BDO INSIGHT

Plans that had a short plan year that began on or after January 1, 2022, would have needed to amend their plan by the end of that short plan year for 2020 suspended RMDs and for CRDs and expanded plan loans. Those plans now have until December 31, 2025, to amend for suspending the 2020 RMDs, but do not have any further relief for amending the plan for CRDs and expanded plan loans. Late amendments may be corrected under the IRS's Employee Plans Compliance Resolution System (EPCRS).

Under the CARES Act, suspending the 2020 RMDs and allowing CRDs and expanded plan participant loans were optional, not mandatory, provisions -- employers and IRA owners were free to ignore or implement those opportunities. Therefore, it is unlikely the IRS would include those provisions in its annual Required Amendments List (RAL) for individually designed plans.

Generally, individually designed plans have two years after an item appears on the RAL to adopt the required amendment. As part of the new deadline relief, the IRS said that it intends to include in the 2023 RAL all required items from the SECURE, Miners and CARES acts, so that individually designed plans will have a single deadline to adopt all required plan amendments.

RETIREMENT PLANS MUST BE AMENDED BEFORE TERMINATION

Regardless of any IRS relief for plan amendment deadlines, retirement plans must be updated for all relevant changes in the law before they are terminated. This has long been the general rule for retirement plans.

CONCLUSION

Plans that were already amended for the SECURE, Miners and CARES acts may not need to make any changes due to this new amendment deadline relief. But the IRS is expected to issue more guidance under those acts over the next year or so, and plans should remain vigilant to react timely to such guidance.

Nongovernmental plans that have not amended for the SECURE, Miners and CARES acts should vigilantly monitor guidance, including the 2023 RAL, and finalize comprehensive amendments by the 2025 deadline.

Governmental plans should determine their revised amendment deadline based on the legislative sessions of their government bodies.

The amendment deadlines for 457(b) plans sponsored by tax-exempt employers are unchanged. Accordingly, plan amendments might be required as early as December 31, 2022.

Furthermore, the need for more plan amendments is a possibility due to another bipartisan package of retirement plan changes pending in Congress, the so-called “SECURE 2.0,” that may be enacted later this year.

Finally, “Cycle 3” amendments and restatements of IRS pre-approved defined contribution retirement plans were generally required to be signed by July 31, 2022. Employers who missed that deadline may correct that failure under other recent IRS guidance. BDO’s Retirement Plan Services Team can assist with that and other retirement plan corrections.

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