ERISA ROUNDUP

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

Q3 2020

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

As we continue to navigate a new working environment, BDO's ERISA Center of Excellence is committed to highlighting significant regulations and deadlines.

This past quarter we saw the DOL's new rule on electronic disclosures come through as well as temporary relief for Safe Harbor Plans, RMD waivers and rollovers, and more. Also in this issue of our ERISA Roundup are helpful considerations if you missed a deadline due to the COVID-19 pandemic.

With immense changes to our personal and work lives, it is challenging to stay abreast of changes impacting your plans. You can always find up-to-date industry insights at www.bdo.com/erisa.

Sincerely,

BETH GARNER
National Practice Leader, ERISA

IN THIS ISSUE

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.

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2020 Deadlines and Important Dates for Plan Sponsors

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 2020. All plans are different, so some deadlines may not apply or may have dates shifted based on your organization's fiscal year. For additional support, please contact your BDO representative.

OCTOBER

- **1** / Make sure procedures align with language in plan document. Oct 1.
- **1** / Annual notices to participants begin Oct. 1, including 401(k) Plan Safe Harbor Notice, automatic contribution arrangement safe harbor and qualified default investment alternative.
- **15** / File PBGC Form 10 by Oct. 15, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **15** / Oct. 15 is the extended deadline for filing 2019 Form 5500.
- **15** / Oct. 15 is the extended deadline for filing individual and C-Corp tax returns.
- **15** / Oct. 15, single- and multi-employer defined benefit plans file PBGC Comprehensive Premium document and pay $29 per participant flat-rate premium.
- **15** / Oct. 15 to open a Simplified Employee Pension (SEP) plan for extended tax filers.
- **26** / File PBGC Form 200 by Oct. 26, 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.

NOVEMBER

- **16** / File PBGC Form 10 by Nov. 16, Post-Event Notice of Reportable Events for single-employer defined benefit plans

DECEMBER

- **1** / Annual Participant notices must be distributed by Dec. 1. These include: 401(k) safe harbor, annual automatic contribution and qualified default investment alternative (QDIA) notices.
- **15** / Dec. 15 is the extended deadline to distribute Summary Annual Report (SAR) for calendar year plans.
- **31** / By Dec. 31, process corrective distributions for failed ADP/ACP testing; a 10 percent excise tax may apply.
- **31** / Amendments to change traditional 401(k) to safe harbor design, remove safe harbor feature or change certain discretionary modifications must be adopted by Dec. 31.
- **31** / Required minimum distributions for participants age 70 ½ must be completed by Dec. 31 for calendar plan years.*Note: With the passage of the SECURE Act, those who turn 70.5 in 2020 can wait until they turn 72 to start RMDs.
- **31** / Plan sponsors must amend plan documents by Dec. 31 to account for any discretionary changes made during the 2020 year.

In addition to those important deadlines and dates, plan sponsors should be aware of the contribution plan limits and other rolling notices for 2020:

- Employee salary deferral limits for 401(k), 403(b) and 457 plans will be $19,500. Age 50 catch-up contribution limit increases to $6,500.
- Health Savings Account contribution limit is $3,550 (single) and $7,100 (family). Age 55 catch-up contribution stays at $1,000.
- Traditional and Roth Individual Retirement Account contribution limit will be $6,500. 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 $230,000.
- The dollar amount used to define "highly compensated employee" under Section 414(q)(1)(B) will be $130,000.
- Newly eligible employees must receive a Summary Plan Description (SPD) within 90 days.
- Provide quarterly statements and fee information to participants.

Addressing Missed 401(k) Plan Deadlines During COVID-19

The COVID-19 pandemic has put many extra burdens on 401(k) plan sponsors. In addition to navigating all of the uncertainty related to the economy and workplace safety, plan sponsors have had to keep an eye on regular retirement plan procedures and deadlines. Often, workplaces were shut-down for extended periods (and may still be off-limits), so the employees responsible for handling those matters might not have been able to access records or other materials necessary to ensure timely compliance. In some cases, employers may have even laid off or terminated those employees due to a sudden downturn in business.

So, it is entirely possible that 401(k) plan sponsors may have missed some compliance deadlines—especially during the chaotic first few months of the pandemic which started in mid-March for most of the United States. In recognition of this, the federal government has offered some relief for plan sponsors trying to address deadlines that were potentially missed.

DEADLINE EXTENSIONS

Internal Revenue Service (IRS). On April 6, 2020, the IRS issued Notice 2020-23, postponing the due date of many tax payments and filings, and extending many deadlines that would otherwise apply with regard to 401(k) plan administration, so that any such due date or deadline that would ordinarily fall on or after April 1, 2020 through July 14, 2020, was automatically extended to July 15, 2020.

Department of Labor (DOL). On April 29, 2020, the DOL issued Disaster Relief Notice 2020-01 (which IRS concurs with) saying that the DOL will not take enforcement action against plan sponsors who have missed various ERISA deadlines. The notice gives retroactive relief (back to March 1). The notice stresses that the delay must be solely attributable to the pandemic, so employers and service providers should document the cause of the delay and that the missed action was taken as soon as possible.

Here we list key 401(k) plan compliance deadlines from the first six months of 2020 and discuss what plan sponsors can do to address items that may have been overlooked.

KEY 401(K) PLAN MARCH – AUGUST 2020 COMPLIANCE DEADLINES FOR CALENDAR YEAR PLANS

This list shows the original deadlines from March 2020 through August 2020 for some of the key compliance requirements for calendar year 401(k) plans and describes any deadline extensions or suspensions because of the pandemic.

- **March 15:** Deadline to process corrective distributions for plans failing actual deferral percentage (ADP) or actual contribution percentage (ACP) tests (avoiding 10% excise tax). No deadline extension or other relief provided.
- **April 1:** First required minimum distribution (RMD) to terminated participants (or more than 5% owners) who reached age 70.5 in 2019, as well as older participants who retired in 2019. All RMDs for 2020 have been suspended. So, if a participant took a 2019 RMD before April 1 or a 2020 RMD, the participant is allowed to repay it to the plan (or the participant can roll it over tax-free) by August 31, 2020. Participants need to hurry if they want to avoid taxation in 2020, since it seems that participants cannot avoid taxation in 2020 if RMDs are rolled over after August 31, 2020. It is not yet clear how this affects Form 1099-R reporting. It seems that if the RMDs were returned to the original plan, then the distribution would be cancelled, and Form 1099-R would not be needed. But if the participant rolled the RMD into an IRA or another plan, the original plan would have no knowledge of that and would generally be required to issue a Form 1099-R for the RMD.
- **April 15:** Excess contribution refunds for participants who contributed more than the 402(g) limits for 2019. Deadline extended until July 15, 2020 by IRS Notice 2020-23.
- **May 15:** Q1 2020 benefit statements; Q1 participant fee disclosure for plans that allow self-directed investments. Deadline extended until 60 days after the end of the COVID-19 National Emergency, by DOL Disaster Notice 2020-01, but only if the plan acts in good faith and furnishes the material as soon as administratively practicable.
- **June 28:** Deadline for retirement plans with publicly traded employer securities to file their Form 11-K annual report with the U.S. Securities and Exchange Commission (SEC) —i.e., by 180 days after the end of the retirement plan year. Deadline extended to Aug. 12, 2020 for calendar year plans, but only if the issuer files an 8-K and delay is COVID-related.
- **July 28:** Summary of material modifications (SMM) is due to participants—i.e., 210 days after the end of the plan year in which the change was adopted—unless it was included in a timely updated summary plan description (SPD). Deadline extended until 60 days after the end of the COVID-19 National Emergency, by DOL Disaster Notice 2020-01, but only if the plan acts in good faith and furnishes the material as soon as administratively practicable.
- **July 31:** File Form 5500 or file Form 5558 to get an automatic extension to October 15; for plans that do not have self-directed investments, deadline to distribute 2019 annual benefits statement. No deadline extension or other relief provided (so far). (Instead of filing a Form 5558, plan sponsors could also extend the due date to file Form 5500 based on the extended due date of their federal income tax returns.)
- **Aug. 14:** Q2 2020 benefit statement and participant fee disclosure for plans that allow self-directed investments. Deadline extended until 60 days after the end of the COVID-19 National Emergency, by DOL Disaster Notice 2020-01, but only if the plan acts in good faith and furnishes the material as soon as administratively practicable.

RELIEF FOR LATE DEPOSITS OF EMPLOYEE DEFERRALS

In addition to potentially overlooking these deadlines, plan sponsors may have been unable to timely deposit participants' paycheck contributions into their 401(k) plan accounts. Generally, the DOL considers late deposits to be a prohibited transaction, but the agency has granted some leniency amid the pandemic.

DOL **Disaster Relief Notice 2020-01** says that the DOL will not take enforcement action against plan sponsors who have missed their regular "timely deposit" remittance schedules from March 1 until the 60th day following the announced end of the national emergency resulting from COVID-19 (or such other date that DOL may designate in future guidance). The notice gives retroactive relief (back to March 1). The notice stresses that the delay must be solely attributable to the pandemic, so employers and service providers should document the cause of the delay and show that the contributions were deposited into the plan as soon as possible. Plan sponsors should note that, despite the DOL's non-enforcement position, they cannot use employee salary deferrals as operating cash for their business. The need for operating cash, even when the need is created by a COVID-19 shut down, is not a delay that would be protected.

OTHER DOL RELIEF

In more good news, DOL Disaster Relief Notice 2020-01 says that 401(k) plans will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020 and 60 days after the announced end of the COVID-19 National Emergency, if the plan acts in good faith and furnishes the material as soon as administratively practicable. Also, 401(k) plans can use electronic communications with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites, the DOL notice said. This greatly expands existing electronic plan administration rules.

The notice also provided relief for:

- Timely substantiating participant plan loans and distributions - which seems to apply to hardship distributions and special coronavirus distributions, but does not apply to spousal consents (IRS has granted separate relief for obtaining those during the pandemic)
- Giving blackout period notices
- Processing benefit claims and appeals

Finally, the notice stated that ERISA Section 518, as amended by the CARES Act, provides that, for any employee benefit plan sponsor, administrator, participant, beneficiary, or other person affected by a Presidentially declared disaster (or a public health emergency declared by the Secretary of Health and Human Services), the DOL may prescribe a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Section 518 further provides that no plan shall be treated as failing to be operated in accordance with the terms of the plan solely as a result of complying with such postponement of a deadline. So, the relief described herein will generally be for a period of no more than one year (i.e., through February 28, 2021), unless further relief is provided.

BDO INSIGHT: DON'T PANIC. IDENTIFY, DOCUMENT AND ADDRESS

Plan sponsors may just now be realizing that they missed a deadline or made some other oversight. If this is the case, don't panic. There are relatively straightforward ways to address these errors, and for some failures, the federal government has broadened the window for fixing oversights amid the pandemic.

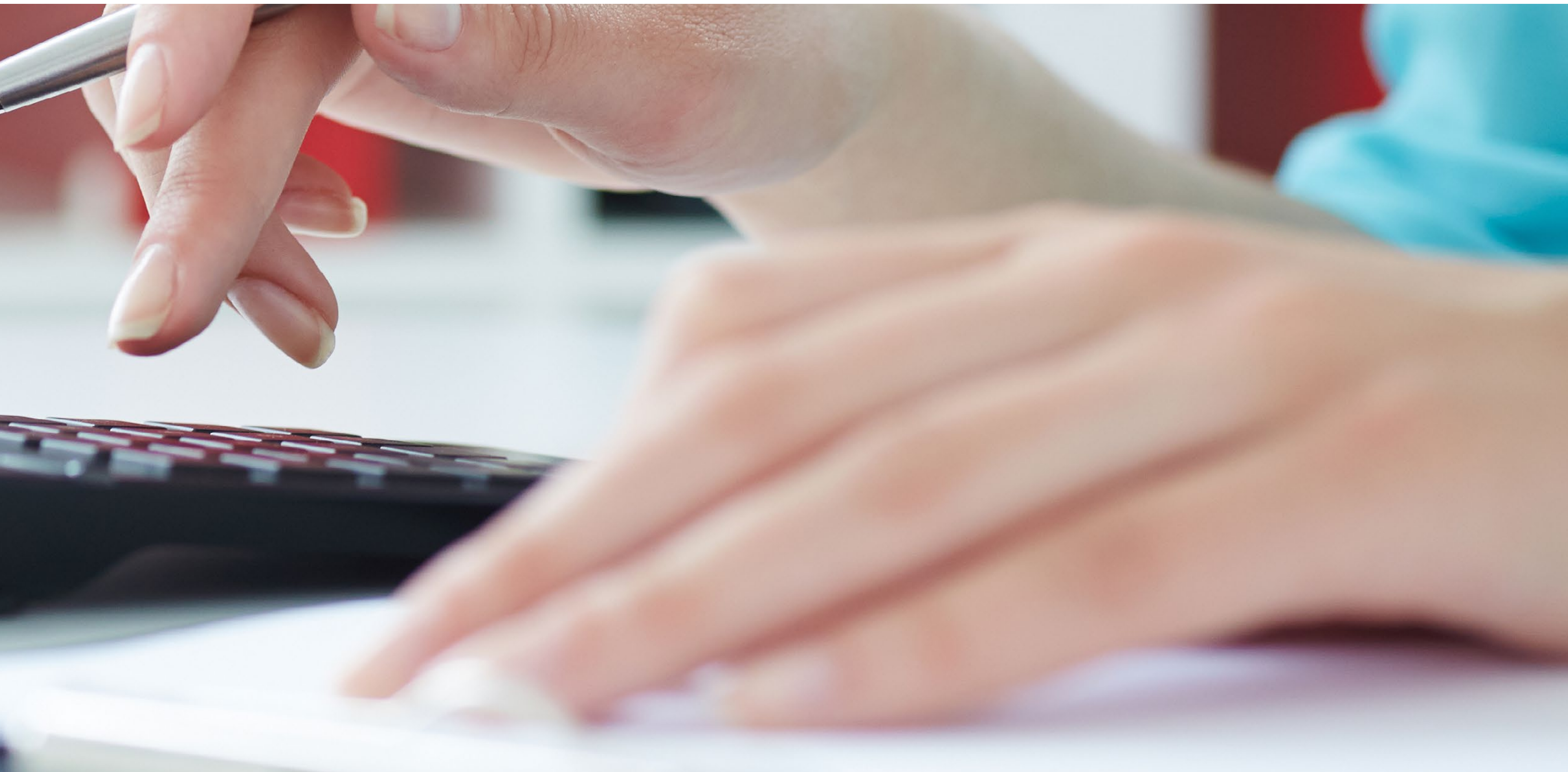
The most important thing is to address the problem as soon as it is discovered by following the proper guidelines to remedy issues. This includes documenting the circumstances around why the deadline was missed and showing how the pandemic contributed to the mistake.

The IRS and DOL each have correction programs that may help plan sponsors avoid severe penalties or plan disqualification as a result of missed compliance deadlines. The IRS' 401(k) **Fix It** Guide (and 403(b) **Fix It** Guide) can help identify and offer solutions for common mistakes. In addition, plan sponsors often can remedy plan disqualification failures by using the IRS' **Employee Plans Compliance Resolution System** (EPCRS), correct certain fiduciary breaches under the Department of Labor (DOL)'s **Voluntary Fiduciary Correction Program** (VFCP) and obtain forgiveness for late Form 5500 filings through DOL's **Delinquent Filer Voluntary Compliance** (DFVC) Program.

Plan sponsors should keep in mind that missed or late compliance items that are not addressed before the start of an independent qualified public accountant audit (if ERISA requires one for that plan year) will likely delay the process and drive up the audit costs.

The pandemic has made this is a very confusing time to manage a retirement plan. Plan sponsors should consult with service providers to make sure they are taking the proper steps to remedy issues and meet future deadlines. Your BDO representative is available to answer your questions and help develop a plan to put you on the right path for any oversights.

These deadlines are similar but not necessarily the same for 403B plans.



Labor Department Introduces Revised Fiduciary Investment Advice Exemption

The ongoing saga about fiduciary standards for advice related to retirement assets has a new chapter that plan sponsors need to be aware of.

In June, the Department of Labor (DOL) proposed a rule that would give plan sponsors and participants additional clarity about whether advice providers are held to a fiduciary standard. The DOL's proposed rule also aligns with many elements of the Securities and Exchange Commission's Regulation Best Interest (Reg BI).

BACKGROUND AND OVERVIEW OF THE DOL'S NEW PROPOSED "FIDUCIARY RULE"

The DOL's proposal comes two years after a federal court invalidated the fiduciary rule set by the Obama Administration, which expanded the definition of a fiduciary. In 2018, the U.S. Appeals Court for the Fifth Circuit vacated the Obama Administration's rule, reinstated the 1975 regulation and removed the **Best Interest Contract Exemption** (BICE).

In June, the DOL introduced a **revised version** and technical amendment that soften some of the standards set in the Obama Administration's regulation. The proposed rule includes a new prohibited transaction class exemption for investment advice fiduciaries for work related to retirement plan assets.

To qualify for the exemption—and get paid for services—investment advice fiduciaries need to follow specific impartial conduct standards and act in the best interest of the participants. This relief would also apply to advice given when rolling assets from a plan to an individual retirement account (IRA). In addition, the **technical amendment** immediately reinstates the 1975 five-part test to determine fiduciary status as well as **Bulletin 96-1** concerning participant investment education.

The vacated rule left many providers to decide on their own whether their services qualified them as a fiduciary, and many providers used the BICE to shield themselves from fiduciary disputes. The new proposal creates more clarity and assurances to plan sponsors and participants as to a provider's fiduciary status, which is particularly important as it relates to rolling retirement assets to an IRA.

ALIGNMENT WITH REG BI

The DOL proposal aligns with the SEC's Reg BI, which sets a higher standard for broker-dealers, registered investment advisers and other advisers. Reg BI, which went into effect on June 30, bans brokers from putting their firm's interests before the needs of their clients. It requires them to disclose key facts about their recommendations, exercise reasonable care when making decisions on behalf of clients, establish and enforce written policies to address conflicts of interest, and establish and enforce written policies to comply with the regulation.

The two rules complement each other, creating a more streamlined fiduciary standard for investment advice. This gives plan sponsors, participants and retail clients more assurance that they are receiving investment advice that is in their best interest.

NEXT STEPS FOR THE RULE

The general public is welcome to submit comments at **www.regulations.gov** using Docket ID number: EBSA-2020-0003 by August 6. The rule will become effective 60 days after the final version is published.

Lawsuits Serve as Warning to Defined Benefit Plans: Review Your Actuarial Assumptions

Increases in life expectancy resulting from medical advancements and better health habits are generally viewed as a sign of progress for society. But for defined benefit plans that haven't updated the assumptions used to determine payouts to participants, increasing life expectancy could lead to an increasing risk of being sued.

Benefit plan participants and beneficiaries have filed several high-profile lawsuits against major defined benefit plans, alleging that the organizations used outdated mortality tables that resulted in the underpayment of benefits. While the majority of these lawsuits remain unsettled, plan sponsors should view these examples as a wake-up call to reexamine the actuarial assumptions they use to determine benefit payouts.

BACKGROUND: BENEFITS MUST BE ACTUARIALLY EQUIVALENT TO A SINGLE-LIFE ANNUITY

The 1974 Employee Retirement Income Security Act (ERISA) requires that all forms of benefit provided by defined benefit plans must be no less than the amount that is actuarially equivalent to a single-life annuity at a normal retirement age, as outlined by plan documents. Single-life annuities may not fit every participant, so defined benefit plans typically list other forms of acceptable benefits, like certain and life annuities and joint and survivor annuities. For joint and survivor annuities, the benefit is paid to the participant until the participant dies, before transferring to the spouse for his or her lifetime at a reduced rate, as designated in the plan documents.

If a plan participant or beneficiary desires an alternative form of payment, such as a certain and life annuity or a joint and survivor annuity, a conversion must be calculated. Plans use interest rate assumptions and mortality tables to calculate such conversions.

UNDERSTANDING THE "REASONABLE" CLAUSE IN THE LAW

Neither ERISA nor the Internal Revenue Code (IRC) explicitly states that plan sponsors must use the most current mortality table or interest rate to make such conversions. Instead, ERISA says that plan sponsors must use "reasonable" assumptions to determine actuarially-equivalent benefits. This "reasonable" clause has been the focus of lawsuits—and should serve as a red flag for other defined benefit plan sponsors who may need to reconsider whether their mortality tables and interest rates meet this subjective standard.

When outdated mortality tables with shorter life expectancies are used, they often result in lower benefit payouts. Plaintiffs argue this is not reasonable and constitutes an ERISA violation because plan fiduciaries are obligated to act in the best interests of plan participants. These lawsuits seek compensation for the difference between benefits received and benefits that would have been generated using "reasonable" mortality tables and interest rates.

The defendants in these cases have filed motions to dismiss the cases, generally arguing that neither ERISA nor the IRC requires the use of specific mortality tables. In addition, defendants have argued that the plaintiffs haven't satisfied the burden of proof to show the unreasonableness of the variables used to calculate the conversions.

BDO INSIGHT: DON'T WAIT FOR A LAWSUIT TO REVIEW YOUR PLAN'S MORTALITY TABLES AND INTEREST RATE ASSUMPTIONS

Mortality tables and interest rates are set when the defined benefit plan initially becomes effective. Many plan sponsors have been unaware that they should evaluate these assumptions on a regular basis.

ERISA's "reasonable" clause is subjective, as we see being played out in the recent lawsuits. But just because the law isn't clear-cut, that doesn't mean that plan sponsors should take a "set it and forget it" approach to their mortality tables and interest rate assumptions.

Plan sponsors who want to avoid lawsuits should develop a proactive strategy with their actuaries and ERISA attorneys to determine whether their assumptions used to calculate conversions can withstand a test in court. accountant audit (if ERISA requires one for that plan year) will likely delay the process and drive up the audit costs.

ESOP Valuation Considerations During Times of Uncertainty

Crises like the coronavirus pandemic can cause significant challenges for administrators and trustees when valuing employee stock ownership plans (ESOPs). Plan administrators must consider whether their current valuations—most of which were finalized as of December 31, 2019—accurately reflect company values now that COVID-19 has introduced unprecedented levels of market volatility and economic uncertainty.

Independent appraisers who lead ESOP valuations use the Internal Revenue Service's standard definition of fair market value—which is the price that would be paid if the organization were sold—to value the company stock. That valuation is used for all distributions in the following year. Because valuations that were finalized at the end of last year may not reflect the value of the company today, companies may be using inaccurate estimates when making distributions. These valuation challenges also affect acquisitions that are in-process, as third-party acquirers seek reassurance that deal terms accurately reflect the current value of a company.

There are two primary options ESOP administrators can consider to help address the risk of using a year-end valuation that doesn't accurately reflect the current value of the company: conducting an interim valuation or making distributions over a multi-year pay schedule.

INTERIM VALUATIONS

When considering the use of interim valuations, organizations should first assess whether the business has been materially affected by market volatility.

Next, organizations should review plan documents to determine whether interim valuations are permissible – or if administrators may amend documents to make them such. This needs to be done carefully, as amendments should be in the best interest of the participants—not the organization. Because amendments shouldn't be reflective of a singular event, organizations should also consider the impacts such amendments will have on the ESOP when company value goes up as well as down.

But even if an interim valuation is allowed by the plan documents, organizations should only do one if they feel that they have appropriate visibility into the business to provide a better estimate of value relative to the most recent year-end valuation. If there is continued uncertainty regarding how the market will affect organizations going forward, it may be very difficult to accurately value. The interim valuation will have an impact on existing ESOP participants as well as those taking a 2020 distribution, and ESOP administrators need to ensure the valuation is fair to both groups.

Finally, the costs of interim valuations should be considered, plus additional administrative costs, such as recreating participant statements.

It is important for organizations to work closely with consultants and advisors throughout this process and thoroughly document the steps taken to provide backup to the decisions made.

PAY SCHEDULES

ESOP administrators who aren't confident that an interim valuation will resolve uncertainty in their most recent valuation may consider using a multi-year distribution schedule to help mitigate risk.

By law, ESOPs are allowed to distribute assets through a lump sum or a schedule of substantially equal annual payments over a multi-year term. Payouts on this schedule will be adjusted as year-end valuations are conducted over the term. This may better protect plan administrators from paying under- or overvalued lump sums in a volatile environment. If the plan document doesn't currently allow for scheduled payments, the document may need to be amended.

BDO INSIGHT: MITIGATE ESOP VALUATION RISK DURING TIMES OF UNCERTAINTY

ESOP administrators and trustees face significant challenges in accurately valuing companies during uncertain market environments. To combat this volatility in new transactions, ESOP Professionals are using tools such as earnouts and claw-backs to help provide reassurance to third-party buyers and bridge any short-term valuation gaps. Similarly, ESOP administrators can consider using interim valuations and / or payout schedules to help mitigate ESOP valuation risk.

While taking steps to mitigate the risk of using valuations that don't reflect today's reality may seem like an obvious thing to do, it is important to realize that interim valuations and payout schedules both involve a host of legal and financial considerations. Your BDO representative can help analyze your unique situation and help to provide the choices and flexibility you need to best navigate ongoing market volatility.

During an Economic Downturn: Review Plan Design and Expenses to Protect Cash Flow

Managing cash flow is an ongoing priority for any business. Protecting an organization's cash flow in times of economic distress is paramount. To retain liquidity in the short term, many organizations are examining their retirement plans for flexibility in cash outflows.

Adjusting or temporarily putting a hold on employer contributions to retirement plans stands out as a prominent option for some, but other less obvious tools can help plan sponsors operate more efficiently during a crisis as well.

Before making any changes, employers need to consider both the short-term and long-term consequences of these actions. While such decisions can provide some immediate cash flow relief, they can also increase long-term costs or negatively impact an organization's employee morale and competitive positioning.

ELIMINATING OR SUSPENDING THE EMPLOYER MATCH

Eliminating or suspending the employer match, while a potentially effective tool employers can use to shore up cash, may not be an option, depending on how the plan document is written. Plans that include an annual safe harbor 401(k) contribution may include restrictions relating to the suspension or elimination of these contributions. Plan documents must be thoroughly reviewed before reaching a decision.

Even if eliminating or suspending the employer match is an option, employers should approach these decisions with care as they may negatively affect an organization's ability to attract new employees. This potential backlash may be the reason many employers are hesitating to suspend contributions, even as we anticipate a continued quarantine. A recent survey by the Plan Sponsor Council of America (PSCA) showed that only 16 percent of benefit plans expect to suspend contributions.

ELIMINATING INACTIVE PARTICIPANTS TO REDUCE ADMINISTRATIVE COSTS

Another option could be to reduce the number of participants in a plan to archive a lower administrative cost in upcoming quarters. Employers can achieve this is by removing inactive participants from the plan. The Internal Revenue Service (IRS) allows plan sponsors to cash out inactive participants with $1,000 or less in their accounts, and plan sponsors don't need permission from the individual to do this. In addition, plan sponsors can roll accounts with balances of $5,000 or less into Individual Retirement Accounts (IRAs).

Participants with more than $5,000 in their accounts can't be forced out of the plan, but plan sponsors are permitted to contact such participants and inquire if they would like to be cashed out. As always, it's important for plan sponsors to refer to their plan documents before seeking to reduce the number of inactive participants or issue distributions.

REVIEW "LOST MONEY" IN THE PLAN

Several other tools exist that may help plan sponsors operate more efficiently:

- **Forfeitures:** Partially vested employees who terminate employment are the most common source of forfeitures. Plan sponsors most commonly use forfeitures to offset employer contributions, but they can also be used to pay for certain permitted plan expenses.
- **ERISA Spending Accounts:** ERISA spending accounts present an opportunity to reduce the total costs charged to the plan. If there isn't a spending account already, plan sponsors should communicate with service providers to determine whether there may be an opportunity to negotiate one.
- **Evaluate Fees:** Plan sponsors have a fiduciary obligation to monitor fees to ensure they are reasonable. Plans should examine their investment, administrative, and consulting fees to determine if saving cash may be possible. Now may be a good time to reach out to service providers to ask for fee reductions. Plan sponsors can also consider shifting some administrative costs, such as audit expenses, from the company to the plan and using forfeitures or ERISA spending accounts for these costs.
- **Changing Eligibility and Matching Provisions:** Changing eligibility requirements and / or matching provisions can also help to conserve cash. For example, plan sponsors could require employees to work for at least one year before becoming eligible for a retirement plan.

BDO INSIGHT: EVALUATE CASH CONSERVATION TOOLS THOUGHTFULLY

When examining the potential tools at your disposal for conserving cash, it's important that employers don't make these decisions in a vacuum. While certain actions can be taken to improve cash flow now, they could lead to greater expenses in the long term—and changes to retirement savings plans may ultimately weaken an organization's ability to recruit and retain talent.

Your BDO representative is available to help evaluate your plan and look for opportunities to create valuable flexibility while still being mindful of the long-term impacts of these changes.

DOL Finalizes Rule on Electronic Disclosure of Retirement Plan Documents

The Department of Labor (DOL) recently finalized a rule that makes it easier for plan sponsors to use email and internet websites to deliver certain retirement plan disclosures or other documents to plan participants.

By making it easier for plans to do away with paper delivery, the new rule is expected to save $3.2 billion in printing, mailing, and other costs over the next 10 years, as well as allow participants options for receiving important plan information in their preferred format.

Plan sponsors can't get away from paper completely at the start, however. Plan sponsors must send an initial paper notice informing participants that documents will be delivered electronically going forward and giving participants the ability to opt out of electronic delivery and receive paper disclosures in the future.

HIGHLIGHTS OF THE FINAL RULE

The final version of the rule, which was published in May and became effective July 27, had a few changes from the proposed rule, which was issued in October 2019. But the final rule remained firm on allowing participants the option to receive paper communications from their plan sponsors.

OTHER KEY ELEMENTS OF THE FINAL RULE INCLUDE:

- **Options for plan sponsors:** The rule gives plan sponsors the option to deliver disclosures electronically—and spells out the safe harbor qualifications for doing so—but plan sponsors can still choose to deliver this information via physical mail. Furthermore, plan sponsors that choose to deliver disclosures electronically have two options for doing so: 1) posting documents to a website and alerting participants via email of the posting; see the next point about notice of internet availability (NOIA); or 2) sending the documents directly to participants via email.
- **Posting documents to a website requires a NOIA:** Plan sponsors that choose to post documents to a website must issue a notice of internet availability (NOIA) to alert participants that new documents are available online. This notice must describe the documents in concise, understandable language; include a hyperlink or web address to the site where the documents are posted; and inform participants of their right to receive paper copies. To avoid participants being overloaded with notices every time a new document is posted, plan sponsors may use an annual NOIA for certain types of documents.
- **Safe harbor doesn't cover all documents or all participants:** The safe harbor only covers retirement plan disclosures, not employee welfare plan notices. In addition, plan sponsors can only use the safe harbor for covered participants who have valid email addresses or smartphone numbers.
- **Plan sponsors must provide opt-out options:** The final rule requires plan sponsors to allow participants the option of opting out of electronic notification altogether (global opt-out) or opting out of just specific types of documents. The final rule gave the example of some participants being comfortable with having certain documents, such as summary plan descriptions, available on a website, but preferring to receive paper versions of their quarterly benefit statements.
- **Participants can change their preferences:** In addition to giving participants the ability to choose whether to receive documents electronically or via mail, plan sponsors must regularly give participants the opportunity to change their preferences.
- **Further participant protections added to the final rule:** Documents and notices posted to a website must be available for at least a year, or until an updated version becomes available. In addition, plan sponsors must have system checks for invalid email addresses as well as proper electronic follow-up contact information when employees leave their jobs.

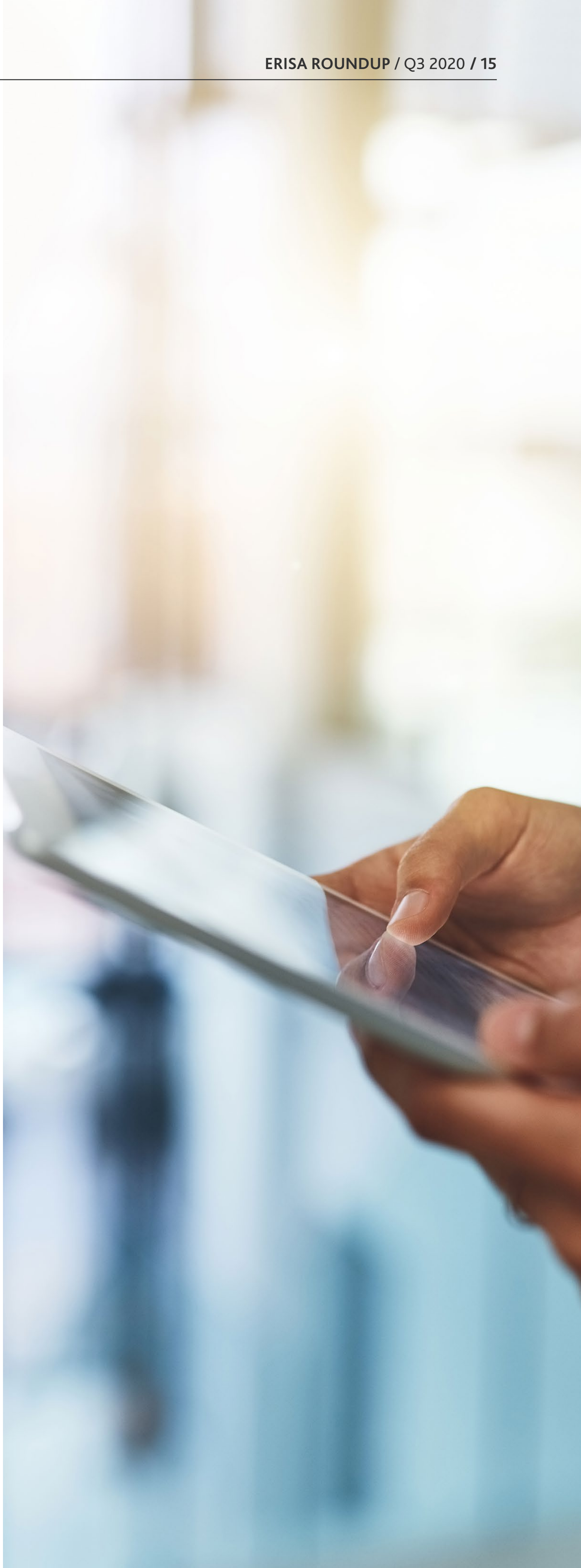
Although the rule didn't become effective until July 27, plan sponsors were allowed to rely on the rule prior to this date without fear of enforcement. The final rule said this was the DOL's way to support the federal government's broader effort to reduce administrative burdens on plan sponsors and service providers as a result of the coronavirus pandemic.

BDO INSIGHT: IS ELECTRONIC DISCLOSURE APPROPRIATE FOR YOUR PLAN?

The new rule should make sending and receiving retirement plan documents more convenient for most participants and plan sponsors. But there are some important considerations that plan sponsors need to think through before switching to electronic delivery.

Earlier this year we wrote about **cybersecurity issues and best practices related to electronic delivery of retirement plan documents**. In addition to this high-priority concern, sponsors may want to review whether specific documents should go online or stay on paper. Lastly, it is important to understand how technologically advanced your workforce is; don't assume that just because seemingly everyone has a smartphone or a computer that all your employees will prefer to review documents online.

Your BDO representative is ready to review the electronic disclosure safe harbor rule with you to see if moving some or all your plan document disclosures online is the right step for your organization.



IRS Delivers Temporary Midyear Relief to 401(k) and 403(b) Safe Harbor Plans

Plan sponsors that have already or are considering reducing or suspending contributions to their safe harbor 401(k) or 403(b) plans as a result of the coronavirus pandemic now have helpful relief thanks to new guidance from the Internal Revenue Service (IRS).

In Notice **2020-52**, the IRS recognized that many employers are facing unprecedented financial challenges as a result of the coronavirus pandemic and that employers may need to reduce or suspend contributions to satisfy payroll and other operating costs. This new guidance allows plan sponsors to make midyear contribution changes without having to satisfy certain rules, including notifying participants in advance. It is important to note that plan sponsors that take advantage of this relief must amend their plan documents to reflect contribution changes by August 31, 2020.

BACKGROUND ON SAFE HARBOR RULES

Safe harbor plans waive certain nondiscrimination testing requirements as long as plan sponsors make a 3% qualified non-elective contribution (QNEC) or comply with a formula for matching employee contributions. Under normal rules, plan sponsors can make midyear contribution changes if they satisfy one of two requirements: 1) they are operating at an economic loss; or 2) they give warning to participants in the annual safe harbor notice that contributions may be reduced or suspended after giving 30 days' notice.

RELIEF IS IMMEDIATE

Notice 2020-52 recognizes that plan sponsors could not have foreseen the coronavirus pandemic and therefore most likely did not include their right to reduce or suspend contributions when they sent their annual safe harbor notices to participants before the start of the 2020 plan year. In addition, plan sponsors may not know at this point whether they are operating at an economic loss for the year.

Consequently, Notice 2020-52 allows plan sponsors to reduce or suspend contributions regardless of whether they are operating at a loss or warned participants of potential reduced/suspended contributions in annual safe harbor notice. To qualify for this relief, plan sponsors must amend the plan document to include contribution changes by August 31, 2020; the amendment is effective on the date the adjustment became operational. As long as participants are notified by August 31, 2020, the notice also temporarily relieves plan sponsors who contribute a QNEC from the 30-day advance notice to participants regarding the change in contributions (but employers who use the matching contribution safe harbor formula must still give affected participants a revised safe harbor notice).

Tax exempt and governmental employers should note that Notice 2020-52 applies to 403(b) plans that use the Section 401(m) safe harbor rules for nondiscrimination testing relief.

The notice clarified that contributions made to highly compensated employees (HCEs) are not included in the definition of safe harbor contributions. Nevertheless, a midyear change that only reduces contributions made on to HCEs may be a change to the plan's required safe harbor notice. Plan sponsors who change the contributions for HCEs (but do not change the contributions for other employees) would need to give HCEs (but not other employees) an updated safe harbor notice and a reasonable time to revise their salary deferral elections.

BDO INSIGHT: DON'T OVERLOOK THE AUGUST 31 AMENDMENT DEADLINE

The IRS has given plan sponsors operating safe harbor 401(k) and 403(b) plans valuable flexibility in adjusting contributions during the coronavirus pandemic. But plan sponsors must amend their plan documents and notify participants by August 31, 2020 to reflect any contribution changes. Failure to do so could jeopardize the plan's tax-qualified status and trigger expensive penalties and tax consequences. This is a very short deadline, which differs from most tax-qualified retirement plan amendment deadlines (which are often not due until years after the effective date of the change).

Your BDO representative is happy to review Notice 2020-52 with you to determine how this temporary relief may affect your 401(k) or 403(b) safe harbor plan.

IRS Extends Relief for 2020 RMD Waivers and Rollovers

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted on March 27, 2020, waived required minimum distributions (RMDs) from tax-qualified defined contribution retirement plans (such as 401(k) and 403(b) plans) and individual retirement accounts (IRAs) that were otherwise due in 2020 to help Americans cope with the uncertainty caused by the COVID-19 pandemic. This was welcome relief for those who wanted to skip RMDs for the year, but the law created many unanswered questions—especially for those who had taken distributions before the law's enactment. This relief does not apply to RMDs from defined benefit plans.

The Internal Revenue Service (IRS) issued guidance in late-June to clarify these issues and ensure that anyone who received an RMD in 2020 from a defined contribution plan or IRA can now roll the funds back into a similar plan. Most notably, IRS Notice 2020-51 extends the deadline for participants to return an unwanted RMD to their retirement accounts to August 31, 2020 (or 60 days after the distribution, whichever is later). The notice also expands the RMD waiver and rollover opportunity to owners of non-spousal inherited IRAs.

KEY ELEMENTS OF NOTICE 2020-51

The recent IRS notice contains five key provisions affecting plan sponsors and individuals who wish to skip RMDs in 2020 or roll previously taken 2020 RMDs back into their retirement accounts:

- Individuals now have until August 31, 2020 to roll 2020 RMDs back into their retirement accounts; before Notice 2020-51, the deadline had been July 15, 2020.
- The RMD waiver now applies to non-spousal inherited IRAs; previously, these accounts had been excluded from the waiver.
- The usual limit of one rollover per year from IRAs does not apply to 2020 RMDs.
- 2020 RMDs can go back to the plan they were taken from, as long as the plan allows it.
- Plan sponsors (but not IRA vendors) will need to amend plans to reflect changes related to 2020 RMDs and rollovers; to help plan sponsors with this, the notice provides a two-part sample amendment that covers 1) giving participants the option of whether to take 2020 RMDs and 2) three options related to making direct rollovers available.

In addition, the notice includes a Q&A section that addresses several common issues related to the relief for RMDs and rollovers. In particular, the guidance specifies that plan sponsors do not have to accept rollovers and that the RMD waiver does not change an individual's required beginning date to take RMDs—it only provides flexibility if RMDs started in 2020 (including 2019 initial RMDs that were allowed to be taken before April 1, 2020).

BDO INSIGHT: IRS EXPANDS RMD RELIEF, BUT DEADLINE IS APPROACHING

While the expansion of the RMD waiver coverage and the extension of the rollover deadline to August 31, 2020 is good news for many, the deadline is fast approaching. Plan sponsors need to act swiftly to see whether their plan allows rollovers of RMDs back into the plan. Those who wish to amend their plan to allow such rollovers should consider using the sample amendment provided in the notice or modify it to fit their plan's circumstances.

Your BDO representative is able to walk you through Notice 2020-51 and answer any questions about changes to RMDs and rollover rules and how they may apply to your company retirement plan.


Expenses
Expense 1
Expense 2
Expense 3
Expense 4
Expense 5
Total
1,245.00
YEAR
$200,000
$0.00

Simplified Calculations for Disallowed Deductions for IRC 132(f) Qualified Transportation Fringe Benefits

Qualified transportation fringe (QTF) benefits under Internal Revenue Code Section 132(f) are transit passes, transportation in commuter highway vehicles and qualified parking (or a combination thereof) provided by an employer to an employee. Subject to monthly limits, QTF benefits can be tax-free to employees. For 2020, the monthly limit is $270 (up from $265 in 2019).

The Tax Cuts and Jobs Act of 2017 (TCJA) disallowed employer deductions for the cost of providing QTFs. Accordingly, employers that filed a federal income tax return for a tax year beginning January 1, 2018, or later must determine if they had nondeductible QTF expenses under Section 274(a)(2). (For a general overview of this TCJA change in the law, see our **January 2019 tax alert**). The disallowed deduction for payments to third parties was relatively straightforward, but the calculations needed to eliminate the deduction (especially for owned or leased parking facilities), were tedious, even when using the four-step methodology that the IRS provided in December 2018 in **Notice 2018-99**.

Many taxpayers providing QTF benefits requested shortcuts to avoid detailed data gathering. The IRS took heed and in recently published **proposed regulations** included a flat rate expense calculation, as well as other shortcuts, as discussed on the following pages.

BDO INSIGHT: The TCJA originally required tax exempt organizations to pay taxes on deemed unrelated business taxable income equal to the amount of their QTF expenses. Much publicity was given to the general retroactively effective repeal of that onerous provision. But tax exempt organizations should note that under the proposed regulations, deductions for QTF expenses will be disallowed if the QTF expenses are directly connected with an unrelated trade or business conducted by the organization.

PERMISSIBLE METHODS FOR DETERMINING QTF DISALLOWED DEDUCTIONS

"Qualified Parking Limit" Methodology

The proposed regulations include two variations of a flat rate calculation for determining the amount of the lost QTF benefit deduction. In each case, employers would use the applicable maximum monthly dollar amount under Section 132(f)(2) (i.e., $270 for 2020) as the monthly total cost.

In the simplest method, employers could multiply the maximum monthly amount by the number of employees to determine the amount of the disallowed deduction. This avoids data gathering (other than total employee headcount, which is typically at hand). But such simplicity comes at a price. This method will likely result in a higher lost deduction than other available methods because it is calculated based on total employee headcount, regardless of whether an employee used the QTF benefits.

A modified version of this shortcut method allows employers to multiply that same monthly flat rate by the number of employees who park in the facility during the "peak demand period." Peak demand period is the time during a typical business day when the greatest number of the taxpayer's employees are using the parking spaces. Parking facilities for shift workers should use the largest shift for the count but disregard shift overlaps.

In Notice 2018-99, the IRS originally said that employers should calculate the lost deduction by determining the actual (or estimated) parking space usage "during normal business hours on a typical business day." The proposed regulations differ from the notice in that employers would now have to identify the number of parking spaces used by employees during the peak demand period. In determining the number of spaces used by employees during the peak demand period, any reasonable method can be used, such as periodic inspections, employee survey or statistical sampling in accordance with Rev. Proc. 2011-42.

The proposed regulations define "parking facility" as one or more indoor or outdoor garages and other structures, as well as parking lots and other areas, where employees may park (but excluding parking spaces on or near property used by the employee for residential purposes). Parking facilities in a single geographic location may be aggregated, but the proposed regulations eliminate some combinations once thought reasonable. The proposed regulations narrowly define "geographic location" as contiguous (i.e., sharing a common boundary but for the interpositions of a road, street, railroad, stream, etc.) tracts or parcels of land owned or leased by the taxpayer.

BDO INSIGHT: This very narrow definition of geographic location prevents the aggregation of two separate locations in the same town or zip code. For instance, a taxpayer who has a headquarters building downtown and a plant in the nearby industrial park cannot treat the two parking facilities as one because the two parking facilities do not share a common boundary. This new guidance differs from many tax positions that were reasonable prior to this guidance, which combined parking at different locations as long as the locations were in the same town or metropolitan area. Any taxpayer who combined parking facilities should reevaluate their methodology in light of these proposed regulations.

If the actual per space expense exceeds the maximum monthly Section 132(f)(2) amount, either variation of the qualified parking limit methodology can only be used if the excess value is timely reported to the employee as taxable compensation in Box 1 of Form W-2.

"Primary Use" Methodology

The proposed regulations adopt the four-step method that was included in Notice 2018-99. Before applying the four steps, employers must first determine the total expenses attributable to the parking facility. Direct parking facility expenses are added to a reasonable allocation of expenses that are shared between parking and non-parking facilities. Allocation of shared expenses can be made using either a reasonable basis or a new, special rule included in the proposed regulations that allows the allocation of 5% for lease or rental payments, utilities, insurance, interest and property taxes. Remember, depreciation of an owned facility is not considered an expense for these purposes.

BDO INSIGHT: Depending on the facts and circumstances, an allocation done based on the facts and circumstances would result in an allocation of shared expenses that is less than 5%. The taxpayer must evaluate the cost benefit of gathering the additional information needed for the facts and circumstance allocation.

Step 1 – Identify employee reserved spaces and allocate expense to those spaces. A new safe harbor that applies to allocations to employee reserved spaces allows for zero deduction disallowance if: (1) the primary use of the available spaces is to provide public parking; and (2) there are five or fewer reserved employee spaces that equal 5% or less of the total spaces.

Step 2 – Determine whether the primary use is for public parking by dividing the number of spaces typically available to the general public by the available spaces. If the result is greater than 50%, the primary use test is satisfied, and no additional expense is disallowed. If the result is 50% or less, continue with Step 3 and Step 4.

Step 3 – Calculate the deduction for reserved nonemployee spaces such as visitors, customers, employee partners, 2% S corporation shareholders and sole proprietors.

Step 4 – Allocate the remaining expenses to spaces used by employees during the peak demand period by dividing the number of non-reserved parking spaces used by employees by the total available parking spaces and then multiply the results by the remaining unallocated expenses to determine the disallowed deduction in addition to Step 1.

"Cost-Per-Space" Methodology

In response to comments that the four-step method was cumbersome and complex, the proposed regulations provide an alternative that allows the amount of the disallowed deduction to be calculated by multiplying the cost-per-space by the number of spaces used by employees during the peak demand period. Cost-per-space is calculated by dividing the total parking expenses (including expense related to inventory/unusable spaces) by the total number of spaces (including inventory/unusable spaces).

The 5% allocation of shared expenses described in the primary use methodology (above) can also be used when determining total parking expenses for this methodology.

BDO INSIGHT: The cost-per-space method may not save much effort when compared to the primary use method, since the employer needs to gather the data on the number of employees who park and the total costs for both methods.

General Methodology

Instead of the three methods described above, taxpayers may use any reasonable interpretation of Section 274(a)(4) to determine the amount of nondeductible parking expense. The proposed regulations allow employers using any reasonable method to allocate mixed expenses to the parking facility using a 5% safe harbor. A methodology is not reasonable if:

- The value (including the fair market value) of the parking is disallowed instead of the related expenses;
- Deductions are taken for expenses allocable to reserved employee spaces; or
- The general public exception is misapplied.

Unusable Spaces

The proposed regulations introduce the concept of inventory/unusable spaces, which are spaces used for inventoried vehicles, qualified nonpersonal vehicles, fleet vehicles used in the trade of business, or parking spaces otherwise not usable for parking by employees, such as spaces needed for loading docks or temporary parking of transport vehicles. Parking expenses allocable to these unusable spaces are excluded from the total parking expenses used under any of the methodologies outlined to calculate the deduction disallowed in connection with QTF.

Comparison of the New Methodologies

Facts: During 2020, ABC owns or leases space in an office building with a parking facility with 100 parking spaces. Five spaces are reserved for ABC employees and 10 spaces are reserved for ABC's customers and visitors. The general public (including employees and owners of other tenants in the same office building as ABC) can park in the facility. ABC currently has 80 employees, and 70 of those employees typically park during peak demand periods. Total expenses properly allocated or incurred for parking are $25,000 per year, $250 per space. For 2020, the IRS monthly qualified parking dollar limit is $270.

METHODOLOGY	DESCRIPTION	AMOUNT OF DISALLOWED DEDUCTION
Qualified Parking Limit Method (Counting All Employees)	$270 x 80 (total number of employees)	$21,600
Qualified Parking Limit Method (Counting Employees Who Park)	$270 x 70 (number of employees who park during peak demand period)	$18,900
Cost Per Space Method	Total parking expense ($25,000) divided by 100 (total number of spaces) = $250 per space. Multiply $250 (cost per space) by 90 (available parking spaces for ABC's employees, since there are 10 spaces reserved for ABC's customers/visitors)	$22,500
Primary Use Method	**Step 1** – Identify employee reserved spaces and allocate expense to those spots. Here, 5 reserved employee spaces x $250 (cost per space) = $1,250 Determine if the safe harbor for reserved employee spaces applies (this disallowance is ignored if the primary use of the available spaces is to provide public parking, there are 5 or fewer reserved employee spaces and the spaces reserved for employees are 5% or less of the total spaces). Here the safe harbor does not apply because the 5 employee reserved spaces are 5% of the spaces. **Step 2** - Determine whether the primary use is for public parking. Here, 100 total spaces minus 5 spaces reserved for employees minus 70 spaces typically used by employees = 25 spaces available for public parking. Next, divide the number of spaces available to the general public (i.e., 25 spaces) by 95 (the total spaces available to ABC's employees and the public, including ABC's customers/visitors, but excluding spaces reserved for ABC's employees) = 26%. This facility does not pass the primary use test because the spots available to the general public during peak demand do not exceed 50% of the available parking spaces. Go on to Steps 3 and 4. **Step 3** – Calculate the deduction for reserved nonemployee spaces such as visitors, customer, employee partners, 2% shareholders and sole proprietors. Here, 10 reserved customer/visitor spaces multiplied by $250 cost per space = $2,500. **Step 4** – Allocate the remaining expenses to spaces used by employees during the peak demand period. Employee usage may be based on actual usage or estimates based on number of spots, number of employees, hours of use or other measures. Divide the number of non-reserved parking spaces used by employees (i.e., 70), by the total available parking spaces (i.e., 85), then multiply the result by the remaining unallocated expenses = $17,500 (subtotal) of disallowed deductions, plus $1,250 in disallowed deductions for employee reserved spaces (as determined in Step 1).	$18,750

EXCEPTIONS FOR QTF DISALLOWED DEDUCTIONS

Treat as Taxable Employee Compensation

If the employer includes the value of the QTF benefits in the employee's taxable compensation, then there is no disallowed deduction. This exception does not apply if the value included in the employees' taxable income is not timely or is less than the amount required (such as where the purported value for the compensation is zero).

BDO INSIGHT: This provision makes it clear that one debatable position from last year is no longer a reasonable application of the rules where the parking was located in areas where the fair market value of the benefit was zero because parking in that area was generally free. Previously, the employer might have taken the position that no expenses were disallowed because the fair market value of zero was included in the employees' taxable income. Under the proposed regulations, there would be a disallowance of expenses of providing the parking even when the fair market value of such parking is less than the Section 132(f)(2) amount or the cost per space.

Available to the General Public

Section 274(e)(7) applies to expenses for goods, services, and facilities made available by the taxpayer to the general public. Accordingly, the proposed regulations do not apply the disallowance under Section 274(a) to expenses for transportation in a commuter highway vehicle, any transit pass, and parking that otherwise qualify as QTFs that are made available to the general public. This is the basis for the primary use test described above, but the exception does not apply if the items are available only to an exclusive list of guests.

The definition of general public includes (but is not limited to) customers, clients, visitors, individuals delivering goods or services to the taxpayer, and patients of health care facilities. Not included are employees, partners, 2% S corporation shareholders, sole proprietors or independent contractors of the taxpayer. However, individuals having these relationships with other tenants in a multi-tenant building with a shared parking facility would be included as members of the general public.

Bona Fide Sales

Section 274(e)(8) applies to expenses for goods or services that are sold by the taxpayer in a bona fide transaction. Under the proposed regulations, the bona fide sales exclusion under Section 274(e)(8) applies to the employer's expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF that is sold to customers, including employees who purchase the transportation for an adequate and full consideration in money or money's worth. However, pre-tax contributions by employees to pay for QTF benefits do not satisfy the requirements for this exclusion, because the employer incurs the QTF expense under a salary reduction agreement (instead of a deductible compensation expense).

BDO INSIGHT: Employers should not follow the prior year's calculations of disallowed expenses without evaluating these new methodologies and related clarifications contained in the proposed regulations. Taxpayers may rely on the proposed regulations for QTF expenses and transportation and commuting expenses discussed below, as applicable, that are paid or incurred in tax years that begin after December 31, 2017. Alternatively, a taxpayer may choose to rely on a reasonable interpretation of the TCJA statute and the QTF guidance in Notice **2018-99** until the proposed regulations become final.

NEW GUIDANCE ON COMMUTING FROM PERSONAL RESIDENCE

The proposed regulations include more information on new Section 274(l), which was created by the TCJA and is effective for expenses paid or incurred after December 31, 2017. Section 274(l) disallows deductions for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee in connection with travel between the employee's residence and place of employment, "except as necessary for ensuring the safety of the employee." The term "safety of the employee," includes only a bona fide, business-oriented security concern.

The proposed regulations clarify that the disallowed deduction applies to travel that originates at a transportation hub near the employee's residence or place of employment. For example, an employee who commutes to work by airplane from an airport near the employee's residence to an airport near the employee's place of employment is traveling between the residence and place of employment.

The definition of the employee's "residence" is also clarified. Whether property is used by the taxpayer as the taxpayer's residence depends upon all the facts and circumstances and might include a houseboat, a house trailer, or the house or apartment that the taxpayer is entitled to occupy as a tenant-stockholder in a cooperative housing corporation. These provisions are likely to treat part-time or vacation homes as a residence subject to these disallowance rules.

According to the proposed regulations, the exception in Section 274(e)(2) for expenses treated as compensation does not apply to Section 274(l) transportation and commuting expenses, because the exceptions in Section 274(e) apply only to amounts that are disallowed under Section 274(a), and not to those disallowed under Section 274(l).

BDO INSIGHT: The proposed regulations included guidance under new Section 274(l), even though such guidance is not directly related to how to calculate the disallowed deduction for QTF expenses.

For example, assume an executive's personal residence is in Florida, but the executive primarily works in New York City. The employer pays for the executive's air travel back and forth each week. Under long-standing IRS rules, New York City is the executive's "tax home," even though Florida is his or her personal home. Thus, the employer would include the expense of the executive's commuting in the executive's taxable compensation (i.e., in Boxes 1, 3 and 5 of IRS Form W-2), since the employer is paying the executive's personal expense. Before 274(l) was enacted, it appeared that employers could take a compensation deduction equal to the amount of the commuting expense included in the executive's taxable income. But the proposed regulations say that the employer cannot take that deduction (even if the commuting expense was included in the executive's taxable compensation) because the exception for amounts included in an employee's taxable income does not apply to 274(l). That result is consistent with the TCJA's overall concept of disallowing deductions to pay for TCJA's tax cuts.

Navigating Defined Benefit Plan Funding Issues Amid the COVID-19 Pandemic

Even before the COVID-19 crisis struck, pension plans were bracing for major funding challenges heading into 2021. Funding relief for pension plans in the form of interest rate stabilization was scheduled to begin phasing out that year. Plummeting asset values and further declines in interest rates as a result of COVID-19 have significantly exacerbated the problem.

These conditions have put added stress on plans to maintain appropriate funding levels. Plan sponsors expect cash funding obligations to increase 98 percent in 2021, according to an April **survey** by the American Benefits Council (ABC). The 703 companies surveyed expect to tack an additional $9 billion onto their expected contributions as a result of the current economic crisis and certain funding rules.

While the Coronavirus Aid, Relief and Economic Security (CARES) Act passed in March provided some relief for plan sponsors related to contribution and filing deadlines, the law did not address delaying the scheduled phasing out of interest rate stabilization rules. Groups like ABC are lobbying Congress for an extension, but until things change, plan sponsors should be aware of how legal and economic changes affecting the funding environment could affect their plans.

INTEREST RATE STABILIZATION COMING TO AN END

A 2012 law called Moving Ahead for Progress in the 21st Century, or MAP-21, has provided a significant measure of relief for pension plans by stabilizing interest rates for the past eight years. The law was designed to smooth out the impact of low interest rates, which increase liabilities and therefore force employers to increase contributions.

Instead of using a 24-month average of high-quality corporate bond rates, MAP-21 allows plan sponsors to use a funding rate equal to a 25-year average of high-yield corporate bonds multiplied by 90 percent. The multiplier in this rule, however, is set to decrease to 85 percent in 2021 and then drop five additional percentage points each year until the multiplier reaches 70 percent in 2024. In addition, the average 25-year rate will continue to decrease as older, higher rates leave the average and lower, more recent vintages enter. Together these changes will result in larger unfunded liabilities for plan sponsors, which will then require greater funding levels.

This is coming at a time when pension funds are dealing with portfolios that have eroded in value and operating profits that have been cast into uncertainty because of the COVID-19 crisis. It adds up to a situation that will make it difficult for many plan sponsors to meet their funding obligations.

IMPLICATIONS OF FALLING FUNDING LEVELS

A decrease in a pension plan's funding level can have major implications for the plan and its participants. The Pension Benefit Guaranty Corp (PBGC), which serves as the insurance company for defined benefit plans, requires all single-employer plans to pay a flat-rate premium based on the number of plan participants. Underfunded plans pay an extra variable-rate premium based on the amount of unfunded vested benefits. In 2020, the flat rate is $83 per participant, and the variable rate is $45 for every $1,000 of unfunded vested benefits; this is capped at $561 per participant.

Plans whose funding levels fall below 80 percent face additional restrictions when it comes to lump-sum payouts. Plans that are between 60 percent and 80 percent funded are limited to paying out only half of a payable lump sum. Plans that are less than 60 percent funded are prohibited from paying out any lump sums. Lump sums that are $5,000 or less may be paid in full. Participants must be notified within 30 days of when the restriction goes into effect, as well as when it is lifted.

Meanwhile, the PBGC requires pension plans and their sponsoring companies to notify the PBGC when certain events affect the plan. Reductions in active participants, missed required contributions, and inability to pay benefits are all scenarios that many plan sponsors may experience in the near future that the PBGC will want to know about. In addition, layoffs may result in a **partial plan termination**, which entails a host of considerations and requirements that plan sponsors need to be aware of.

BDO INSIGHT: DON'T LET COVID-19 OVERSHADOW OTHER CHANGES ON THE HORIZON

The impact of the COVID-19 pandemic on pension plans has been substantial. But the crisis shouldn't distract plan sponsors from other major changes on the horizon that could significantly affect funding levels. While the CARES Act delayed contribution payments it didn't extend the current interest rate stabilization regime, which has relieved funding issues for pensions over the past decade.

Several lobbying firms are working to address this, but plan sponsors should work closely with their service providers to stay on top of how future obligations may change. Your BDO representative is able to help you understand the impact that unfunded liabilities may have on your defined benefit plan.

How Furloughs and Layoffs May Affect Company Retirement Plans

The coronavirus pandemic has forced many employers to implement some form of workforce reduction to continue operating. While furloughs and layoffs have a significant and immediate impact on a company's operations, plan sponsors also need to understand the longer-term effects workforce reductions have on participants' benefits and retirement accounts.

Over the next several months, employers should be mindful of their ongoing obligations and responsibilities as benefit plan sponsors.

FURLOUGHS VS. LAYOFFS

First, it's important to understand the varying impacts of a furlough versus a layoff. A furloughed employee (one who is considered on unpaid temporary leave of service, with the expectation that they will eventually return to work) may continue to receive some or all of their benefits during their time away, including healthcare and retirement benefits. However, because furloughed employees aren't receiving a paycheck, they won't continue to contribute to their 401(k). Employers may decide to make non-elective plan contributions for furloughed employees — although many companies may find this difficult to do considering the current economic uncertainty.

By contrast, laid-off (terminated) employees who are no longer part of the company are not considered active members of a company's retirement plan and therefore are unable to contribute to it. In general, laid-off employees can leave their 401(k) assets in the plan, cash out, or roll assets into another plan or individual retirement account (IRA).

LOANS AND WITHDRAWALS DURING A FURLOUGH

Plan sponsors should first reference their plan document to understand what existing guidelines they have in place regarding employment status and loans and withdrawals. If the plan allows in-service loans and withdrawals, these options may be available to furloughed employees who meet the plan's qualifications. The Coronavirus Aid, Relief, and Economic Security (CARES) Act gives employers the ability to allow qualifying participants (including furloughed employees) access to the lesser of $100,000 or 100 percent of their vested account balance. As always, plan documents can be amended to change the way loans operate.

LOAN REPAYMENTS FOR FURLOUGHED EMPLOYEES

The CARES Act allows – but does not require - employers to extend current qualified plan loan repayments by up to 12 months; this provision applies to loans to furloughed employees, as well.

Depending upon the terms of each plan, employees whose loans aren't related to the virus may be required to repay their loans sooner if they are laid off. In addition, if the loan isn't paid back on time, the participant's loan balance will be considered in default and will become a taxable distribution.

VESTING ISSUES FOR FURLOUGHED EMPLOYEES

Some plans have vesting requirements that employees need to reach to have complete ownership of company matching contributions. Employers can define vesting in various ways, including based on a specific duration of time of employment or hours of service; however the maximum timeframe to vest is six years of full-time service.

A furlough may affect an employee's vesting schedule as well. For plans that base vesting on hours of service, furloughed employees aren't able to make progress toward such thresholds during a furlough because they are no longer working. For example, employees who need to have 1,000 hours of service to get to the next vesting level might not achieve that goal in 2020, depending on the length of the furlough. On the other hand, a duration of time vesting requirement isn't affected by furloughs because these requirements are tied to when the employee starts and stops employment; the furlough time period counts toward this service requirement.

BDO INSIGHT: PLAN AHEAD AND COMMUNICATE

Plan sponsors whose organizations leveraged furloughs or layoffs to help stabilize from an immediate cashflow perspective need to understand the implications of these decisions to ensure that the company meets its obligations to plan participants.

Clear and timely communication with plan participants is very important in this environment. Employers should be proactive in ensuring that they can reach employees on a consistent basis; this includes confirming that they have proper contact information for employees on file before and during reductions in force. Employers should also work with service providers to understand how they may help in tracking and communicating with plan participants.

Plan sponsors should consult with their plan advisors and benefits professionals to understand the retirement plan implications of furloughs and layoffs and meet obligations to employees after these weighty decisions are made.

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