ERISA ROUNDUP

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

Q2 2021

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

Right as we were finding our rhythm in the work-from-home environment, many companies are asking their employees to trade athleisurewear for suits and welcoming them back into the office. The future of work will certainly look different and you can trust that the BDO ERISA Center of Excellence will continue to be a reliable resource every step of the way.

In this edition of our ERISA Roundup you'll find valuable materials covering the issues impacting plan sponsors and HR professionals. Have you looked into how nonqualified deferred compensation plans can help your company attract and retain top talent? Our latest insight will walk you through the many complexities. Have you seen the DOL's new guidance on cybersecurity? Read more to see what you may have missed.

As always, I encourage you to follow along with our regular insights at www.bdo.com/erisa. Be sure to check out our podcast series BDO Talks ERISA and send us a message about topics you want to hear more about at BDOTalksERISA@bdo.com.

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.

2021 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 2021. Dates assume a calendar year plan.

JULY

14 / Action: Plans with publicly traded employer stock that use an ERISA format that requested a 15 calendar day extension (Form 12b-25) for the Form 11-K must file the Form 11-k with the Securities and Exchange Commission by July 14.

26 / Action: File PBGC Form 200 by July 26, if plan sponsor of a single-employer defined benefit plan does not make a July 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.

15 / July 15, possible second quarter 2021 contribution due for defined benefit pension plans

AUGUST

2 / Action: Large plan audit must be completed by Aug. 2 to avoid requesting Form 5500 extension.

2 / Action: IRS Form 5500 must be filed by Aug. 2.

2 / Action: To request a Form 5500 extension, Form 5558 must be submitted by Aug. 2.

2 / Action: Pay Patient-Centered Outcomes Research Institute (PCORI) fee by Aug 2. Self-insured health plans must pay $2.66 per person (covered by health plan).

13 / File PBGC Form 10, by Aug 13, if a defined benefit plan with >100 participants 1) missed its July 15 required contribution, 2) the contribution is still unpaid as of Aug 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.

31 / Best Practice: Plans that failed compliance testing may take this mid-year opportunity to run compliance tests. Aug. 31

SEPTEMBER

15 / Fund: If an extension was filed, Sept. 15 is the deadline to fund employer contributions.

15 / Fund: Minimum funding deadline for single- and multi-employer defined benefit plans.

15 / Sept 15, last date to make 2020 contributions for defined benefit pension plans.

25 / Action: File PBGC Form 200 by Sept. 25, if plan sponsor of a single-employer defined benefit plan does not make the Sept. 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.

30 / Distribution: Sept. 30, Summary Annual Report sent to participants with Dec. 31 plan year end.

OCTOBER

1 / Best Practice: Make sure procedures align with language in plan document. Oct 1.

1 / Distribution: 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, 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 2021 contribution due for defined benefit pension plans

15 / Action: Oct. 15 is the extended deadline for filing Form 5500, including Schedule SB (single employer defined benefit plans) or Schedule MB (multiemployer defined benefit plans)

15 / Action: Oct. 15 is the extended deadline for filing individual and C-Corp tax returns.

15 / Action: Oct. 15, multi-employer defined benefit plans file PBGC Comprehensive Premium document and pay $29 per participant flat-rate premium.

15 / Action: Oct. 15 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.

30 / Distribution: Single-employer defined benefit plans that are less than 60 percent funded must inform participants by October 30 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 2021

1 / Distribution: 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. Effective in 2020, plans that provide the Qualified Non-Elective Contribution Safe Harbor and are not subject to automatic enrollment are not required to provide a written annual notice.

15 / Action: Dec. 15 is the extended deadline to distribute Summary Annual Report (SAR) for calendar year plans.

31 / Action: Dec. 31 is the final deadline to process corrective distributions for failed ADP/ACP testing; a 10 percent excise tax may apply.

31 / Action: Amendments to change traditional

In addition to those important deadlines and dates, plan sponsors should be aware of the contribution plan limits and other rolling notices for 2021:

- 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 $3,600 (single) and $7,200 (family). Age 55 catch-up contribution stays at $1,000.
- 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 $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 after becoming covered by the Plan.
- Provide quarterly statements and fee information to participants.

New Podcast! BDO Talks ERISA

In February, our ERISA Center of Excellence launched 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 6: Not a Matter of if, but When: Protecting Your Data and Your Responsibilities as a Plan Sponsor

On this episode we welcome Mike Stiglianese, Managing Director with BDO's Consulting Technology Advisory Services practice in New York. Mike has served the IT industry for more than 30 years and sheds light on risks currently presented today – and steps plan sponsors can take to better prepare their workforce. in the employee benefit landscape.

LISTEN TO EPISODE 6 NOW

Episode 7: The Keys to Success: Communicating with Your Employee Benefits Auditor

We sit down in this month's episode to discuss steps to ensure a smooth audit process for your employee benefit plan. There are many moving pieces involved during your audit, but it doesn't have to be such a headache! Listen for tips on what you can do to prepare.

LISTEN TO EPISODE 7 NOW

Episode 8: No Surprises: Prepare for Changes in Healthcare Impacting Benefit Plans

It is no surprise that healthcare is evolving, and the events of this past year are informing new rules and regulations related to healthcare from all angles. In this episode, we are joined by guest Venson Wallin, National Healthcare and Regulatory & Compliance Leader from BDO's Center of Healthcare Excellence & Innovation, to cover all the changes impacting benefit plans. Venson shares his knowledge on transparency in coverage, the No Surprises act, the transition from volume to value, and more on this month's episode.

LISTEN TO EPISODE 8 NOW

Preparing for Mandatory Lifetime Income Disclosures for DC Plans

As part of the overall movement toward financial wellness, Congress and the Department of Labor (DOL) are focused on giving retirees more visibility into how retirement savings translate into lifetime income. In the Setting Every Community Up for Retirement (SECURE) Act of 2019, Congress required an annual lifetime income disclosure for ERISA defined contribution plans. In August 2020, the DOL issued an **interim final rule (IFR)** that implements this lifetime income disclosure requirement and provides specifics on what plan sponsors must do to follow it.

The DOL's IFR lays out the specific assumptions that are required for calculating the annuity amounts and provides model language that plan sponsors can use to describe the calculations. Plan sponsors are allowed to go beyond these baseline requirements, but they need to understand that doing so creates potential liability.

INCOME DISCLOSURE REQUIRED AT LEAST ANNUALLY IN TWO WAYS

The rule requires plan sponsors to provide participants' account balances and illustrate those amounts at least annually in the following two ways:

- Monthly payments in the form of a single life annuity (SLA)
- Monthly payments in the form of a qualified joint and survivor annuity (QJSA)

The rule doesn't require plan sponsors to offer annuities; annuities are simply the method used to give plan participants a sense of their monthly income at retirement. This information is expected to help participants assess their preparedness for retirement and potentially encourage participants who are behind in their retirement savings to increase their contribution amounts.

The interim final rule will take effect on September 18, 2021 and will apply to benefits statements made after that date. Because this is an interim rule, the DOL is taking **public comments into consideration** before issuing a final version (the comment period closed as of November 17, 2020). The DOL has stated that it intends to issue a final rule in advance of the effective date.

REQUIRED ASSUMPTIONS FOR LIFETIME INCOME CALCULATIONS

The rule outlines four key pieces of information to be used in the SLA and QJSA calculations:

- Participant's vested account balance on the last day of the statement period
- Start date for annuity payments and participant's age at that time (the calculation assumes that the participant's annuity will begin at age 67, unless the participant at the time happens to be older than 67, in which case the calculation uses the participant's current age)
- Participant's marital status (note that even if a participant isn't married, plan sponsors are still required to show a joint survivor annuity, which assumes that the participant's spouse is the same age as the participant)
- 10-year Constant Maturity Treasury (CMT) securities yield rate that will be used in conjunction with the appropriate mortality table

REQUIRED EXPLANATIONS AND MODEL LANGUAGE

Alongside the lifetime income illustrations, plan sponsors must include brief, understandable explanations of 11 items. These items include: benefit start date and age assumptions; marital, interest rate, and mortality assumptions; definitions of SLAs and QJSAs and how they work; the fact that these illustrations are estimates only and don't constitute guarantees; and other factors to consider which may significantly influence monthly payments.

Plan sponsors can choose to use the DOL's Model Benefit Statement, which provides model language for each of the required explanations. Plan sponsors can choose to modify the model language to a limited extent, but the DOL has stated that the language used must be substantially similar to the DOL's model language.

BDO INSIGHT: Going Beyond the Standard Disclosures May Create Liability

Many plan sponsors have expressed concern that the DOL's required baseline assumptions lead to an inaccurate illustration of lifetime income for several reasons, including the fact that they don't consider any future contributions from participants. If plan sponsors feel that the required disclosures don't accurately portray the full picture, the DOL allows plan sponsors to include expanded illustrations as long as they are clearly explained and reasonable assumptions are used.

But plan sponsors that are worried about liability issues may want to stick closer to the language in the ruling. The DOL has stated that plan sponsors who use the regulation's assumptions and model language won't be held liable under the law if a participant is unable to purchase an annuity equivalent to the provided illustrations.

The DOL's rule may not be perfect. But plan sponsors should understand that sticking to the model language is the safest route to avoid potential liability. Plan sponsors should review their participant statements and work with their service providers to ensure they are in compliance with the rule once it becomes effective. Your BDO representative can help you review the DOL's interim final rule.

Missing Participants: What Plan Sponsors Need to Know About the DOL's Latest Guidance

When workers change jobs and relocate, plan sponsors face several challenges, including locating former employees who have left funds in a qualified retirement plan and failed to keep their contact information current. The scope of the missing participants problem is enormous: A 2018 survey found that one out of every five job changes results in a missing participant.[1] Now that the COVID-19 pandemic has resulted in economic and physical dislocation of millions of employees, the issue has taken on even greater urgency: Some 5% of U.S. adults relocated due to the financial pressures of the pandemic, according to a poll by the Pew Research Center.[2]

In early 2021, the Department of Labor (DOL) issued a three-part package of sub-regulatory guidance related to missing participants that addresses the fiduciary responsibilities of plan sponsors related to these plan participants and beneficiaries.

DOL'S RECOMMENDED BEST PRACTICES FOR MISSING PARTICIPANTS

The DOL's ***Missing Participants—Best Practices for Pension Plans*** describes a range of steps that retirement plan fiduciaries should consider to locate missing or nonresponsive participants. Plan fiduciaries should determine which practices will be most effective for the plan's specific population.

Some examples of the DOL's recommended best practices include:

- Maintain accurate information by periodically contacting participants and their beneficiaries to confirm or update their information (i.e. home and business addresses, phone numbers, social media handles, and next of kin/emergency contact information)
- Implement effective communication strategies, including using plain language in all communications and building steps into plan onboarding, enrollment, and exit processes to confirm or update contact information
- Search for missing participants by performing the following:
  - Checking related plan and employer records for contact information
  - Attempt to contact them via email addresses, phone numbers, and social media
  - Use free online search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries, social media engines, certified mail, and/or a commercial locator services to locate individuals
- Document all procedures, communications, and actions taken to implement policies. For plans using third-party record keepers to maintain plan records and handle participant communications, ensure that the record keeper is performing agreed-upon services and work with them to identify and correct shortcomings in the plan's record keeping and communication practices.

1 The mobile workforce's growing **missing participant problem**.
2 **Pew Research Center**

OUTLINING EBSA'S INVESTIGATIVE APPROACH

The Compliance Assistance Release 2021-01 outlines the general investigative approach that will guide the Employee Benefits Security Administration (EBSA) under the Terminated Vested Participants Project audits. It is also intended to facilitate voluntary compliance efforts on the part of plan fiduciaries. In opening an investigation, EBSA seeks to determine the scope of any potential problems a plan may have with recordkeeping or administration of benefits for terminated vested participants and beneficiaries.

Potential red flags that an EBSA investigator would look for are the following:

- Systemic errors in plan recordkeeping and administration, which may include missing and incomplete data, such as names, dates of birth, and social security numbers
- Inadequate procedures to identify and locate missing participants and beneficiaries
- Inadequate procedures to contact terminated vested participants (TVPs) nearing normal retirement age to inform them of their right to commence payment of their benefits
- Inadequate procedures for contacting TVPs and the beneficiaries of deceased TVPs who are not in pay status at or near the date that they must begin taking required minimum distributions (RMDs)
- Inadequate procedures for addressing uncashed distribution checks

MAKING USE OF THE PBGC MISSING PARTICIPANT PROGRAM

Additionally, the Field Assistance Bulletin (FAB) 2021-01 announced a temporary enforcement policy applicable to terminating defined contribution plans. The DOL will not pursue Plan fiduciaries of such plans that use the PBGC Missing Participants Program as long as they satisfy certain conditions to qualify for the safe harbor by conducting a "diligent search." Following the transfer of the assets, the PBGC will include participants' information in a searchable database and take certain steps to locate the participants.

The guidance describes which participant accounts may be transferred to the PBGC and the rules for participant notices. The PBGC cites multiple benefits of the program, including:

- Benefits of any size can be transferred to the PBGC
- Periodic active searches by the PBGC increase the likelihood of connecting missing participants with their benefits
- Benefits aren't diminished by ongoing maintenance fees or distribution charges
- Transferred amounts grow with interest
- Lifetime income options are available for balance transfers over $5,000

BDO INSIGHT: Meeting your fiduciary obligations with respect to missing participants

While the DOL's latest guidance on missing participants doesn't have the force and effect of the law, plan sponsors should carefully review this guidance and adjust their processes and procedures as necessary ahead of any potential missing participant investigations. Your BDO representative is available to review your plan, address any red flags, and implement best practices in managing the challenges caused by missing participants.

Employer-Sponsored Student Loan Debt Relief Extended Through 2025

Employers can provide up to $5,250 annually in tax-free student loan repayment benefits per employee through 2025. This benefit, originally included in the Coronavirus Aid, Relief and Economic Security (CARES) Act enacted in March 2020, was for calendar year 2020 only but was extended for an additional five years by the Consolidated Appropriations Act, 2021 (CAA), enacted in December 2020. To qualify for this tax-free treatment, the student loan debt must be for the employee's own education, not for the education of a spouse or family member.

With the extension of the student loan repayment benefit, employers may wish to consider offering it as a way to help employees alleviate the burden of student loan debt and improve their overall financial wellness.

QUANTIFYING THE BURDEN OF STUDENT LOANS

Americans collectively have more than $1.4 trillion in student loan debt, making it the second-highest form of consumer debt, trailing only home mortgages.[3] Currently, 43.2 million Americans have student loans averaging about $39,400 each, and more than 35 million of these borrowers may qualify for employer-sponsored relief under the CAA extension.[4]

Many employers and researchers believe that the stress from managing student loan debt can negatively affect employee productivity. In addition to addressing this issue, offering some form of support in paying off student loans can be an effective tool for recruiting employees and building loyalty, especially among young job seekers. In a 2019 study by the American Institute of CPAs, 41% of young adult job seekers indicated that they would like help with student loan debt.[5]

3 Experian, "Debt Reaches New Highs in 2019, but Credit Scores Stay Strong," March 2020, data as of December 31, 2019.

4 EducationData.org, "Student Loan Debt Statistics," data as of February 9, 2021.

5 AICPA, "Health Insurance, Paid Time Off and Student Loan Forgiveness Top List of Millennials' Desired Workplace Benefits: AICPA Survey," May 16, 2019.

EXPANDING EDUCATIONAL ASSISTANCE PROGRAMS

The 2020 laws broadened the definition of eligible education expenses that employers can offer as tax-free benefits for employees and tax-deductible expenses for employers as part of an educational assistance program (EAP) created and operated in accordance with Section 127 of the Internal Revenue Code, beyond current tuition assistance and related expenses. Through 2025, the $5,250 limit per employee applies collectively to the following areas: tuition assistance; related expenses such as books, equipment, supplies, and student fees; and student loan repayment.

While 56% of employers offered tuition assistance, only 8% offered student loan repayment plans in 2019, according to the most recent survey of benefits by the Society for Human Resource Management (SHRM).[6] Employers looking for a competitive edge in attracting and retaining talent should look closely at the new rules and evaluate whether a student loan repayment program may benefit their workforce.

This type of benefit could translate into meaningful savings for employers, as well as employees. For example, an employee in the 22% marginal tax bracket who receives the full $5,250 annual repayment could also see $1,557 in tax savings (across the employee's federal taxes and the employee's share of payroll taxes). Employers could save $402 by excluding this benefit from the employer's share of payroll taxes, in addition to the employer's $5,250 compensation deduction for providing this benefit to employees.

KEY REQUIREMENTS FOR OFFERING STUDENT LOAN REPAYMENT ASSISTANCE

Employers that would like to offer this benefit will need to have a formal, written EAP as defined under **Section 127 of the Internal Revenue Code**. Employers that do not have an EAP will need to adopt one, and employers that already have an EAP will need to amend it to reflect the changes. The written plan must include the following:

- It must not discriminate in favor of highly compensated employees or their dependents
- Not more than 5% of the total amounts paid by the employer can go to shareholders or owners
- Employees cannot be given a choice between receiving educational assistance or another form of payment
- Employers must have reasonably communicated the availability and terms of the program to all eligible employees
- Section 127 allows some flexibility in creating a personalized EAP for your organization; for example, employers can decide on the amount covered, the type of expenses (as permitted by Section 127) and certain eligibility requirements.

BDO INSIGHT: Offering Student Debt Relief Provides More than Tax Advantages

As we move into what hopefully will be the late stages of the COVID-19 pandemic, the employment market should tighten, and employers will be looking to add valuable recruiting and retention tools. Providing tax-free benefits to help employees pay off their student loans could make overall benefits packages meaningfully more attractive—and a potential competitive advantage.

6 Source: Society for Human Resource Management, "Survey of Benefits," December 2019.

DOL Issues Cybersecurity Guidance for Retirement Plans

On April 14, the Department of Labor (DOL) outlined a range of practices for combatting the growing threat of cybercrime to ERISA-covered retirement plans. This first-ever cybersecurity guidance issued by the DOL's Employee Benefits Security Administration (EBSA) casts a wide net, addressing key issues affecting plan sponsors, fiduciaries, record keepers, as well as plan participants and beneficiaries.

The DOL estimates that defined contribution and defined benefit retirement plans hold a combined $9.3 trillion in assets. These plans also store vast amounts of vital personal information online—information that could put participants and their assets at risk if a plan's online systems were breached. In issuing this guidance, the DOL acknowledges the imminent risk posed by acts of cybercrime as well as the obligation of responsible plan fiduciaries, as set forth by ERISA, to help mitigate these risks.

THREE TYPES OF GUIDANCE ISSUED

The DOL's guidance is presented in three separate documents, each targeting a different audience. These best practices and tips are offered as recommendations for safeguarding the assets and personal information of plan participants while helping to reduce the risk of fraud and loss.

Tips for Hiring a Service Provider

This document aims to help plan sponsors and fiduciaries meet their responsibilities under ERISA to prudently select and monitor service providers that follow strong cybersecurity practices. Specific recommendations include scrutinizing the service provider's information security standards, practices, policies, and audit results; evaluating its track record in the industry, including whether the provider has experienced any past security breaches and how it responded; inquiring about any potential insurance policies the service provider may hold that cover cybersecurity breaches; and reviewing contracts to ensure that they include provisions for compliance with cybersecurity and information security standards.

Cybersecurity Program Best Practices

This document offers 12 best practices that address the needs of record keepers and other service providers responsible for managing plan-related IT systems and data, as well as the needs of plan fiduciaries who are responsible for hiring such vendors. The recommended practices include having a formal, well-documented cybersecurity program; conducting annual risk assessments; holding periodic cybersecurity awareness training sessions; and implementing and maintaining strong technical controls in keeping with industry best practices.

Online Security Tips

While this tip sheet targets plan participants and beneficiaries, the information is also important for plan sponsors to know and potentially integrate into employee education programs focused on online safety. These tips include encouraging users to regularly monitor their accounts online; creating strong passwords; using multi-factor authentication; being aware of (and knowing the signs of) phishing attacks; and keeping antivirus applications and all system software up to date.

BUILDING ON PAST DOL GUIDANCE

Although the DOL noted that this guidance was an important "first step" in safeguarding retirement benefits and personal information, it also builds on earlier EBSA guidance that addressed electronic recordkeeping systems and controls for protecting the personal information of plan participants. In this way, the current guidance may serve as a call to action to plan sponsors, fiduciaries and participants to review and update any established cybersecurity practices and protocols or to create a cybersecurity program using these recommendations.

BDO INSIGHT: Keep Strengthening Your Controls

While there is no way to eliminate the risk of cybercrime entirely, plan sponsors who understand and take steps to incorporate the DOL's guidance into their cybersecurity protocols will be on a more solid path to safeguarding their plan assets and participants' vital information.

The DOL guidance should be viewed as guidance or recommendations rather than a set of minimum requirements or as regulations. These recommendations underscore the importance of constantly evaluating, testing, and improving your cybersecurity protocols amid a rapidly evolving threat landscape.

Your BDO representative can help you assess your current cyber risk profile.

Pension Relief Offered by the American Rescue Plan Act

In an effort to help the nation recover from the COVID-19 pandemic and related economic crisis, President Biden signed the $1.9 trillion American Rescue Plan Act of 2021 (ARPA) on March 11, 2021. The law includes stimulus checks, state and local government aid packages, and other measures to support the ongoing economic recovery.

The stimulus package also seeks to help U.S. pension plans deal with the impact of 2020's dramatic economic downturn, as well as the ensuing market volatility and record-low interest rates. The ARPA does this by providing funding relief for single-employer defined benefit plans and special financial assistance for failing multiemployer plans.

SINGLE-EMPLOYER PLAN FUNDING RELIEF

In general, plan sponsors are required to make a minimum funding contribution each year, which is a combination of participants' benefits earned or accrued during the year and an amortized shortfall payment based on the level of unfunded liability each year. The ARPA makes two changes in actuarial assumptions that lower minimum funding requirements for single-employer pension plans: modified interest rate stabilization provisions and extended amortization of funding shortfalls.

MODIFIED INTEREST RATE STABILIZATION PROVISIONS

The interest rate stabilization provisions in the ARPA are designed to increase the interest rate used to calculate contribution requirements, which has the effect of lowering required contributions. Previously, the interest rate used to calculate minimum required contributions was stabilized by adjusting the underlying corporate bond rates to within 10% above or 10% below their 25-year average rate. But because the interest rate corridor was set to widen beginning in 2021, stabilized interest rates were set to decrease—thus increasing plans' minimum required contributions—if Congress didn't act.

The ARPA makes a few important adjustments to interest rate stabilization. The law establishes a 5% floor on the interest rates used to calculate minimum required contributions; without the 5% floor, the effective rates were expected to decrease further given the U.S. Federal Reserve's stated commitment to keep short-term rates low. The ARPA also narrows the interest rate corridor to 5% above or 5% below the 25-year average corporate bond rate through 2025. Starting with the 2026 plan year, the corridor will begin widening by 5% per year until reaching a range of 30% above or 30% below the 25-year average rate for the 2030 plan year.

These changes immediately increase the interest rates used to calculate the present value of expected future benefits payments, which reduces calculated pension liabilities, lowers the annual cost of benefit accruals for plans that are still accruing benefits and lowers funding requirements. The ARPA's provisions are effective starting with the 2020 plan year, but plan sponsors can elect to wait until the 2022 plan year to implement the changes.

EXTENDED AMORTIZATION OF FUNDING SHORTFALLS

By extending the amortization period of funding shortfalls from seven years to 15 years starting in 2022, the ARPA allows plans to spread required shortfall payments over a longer period of time, lowering required annual contributions to the plans. This change can be applied retroactively to plan years beginning in 2019. Existing amortizations from prior periods will be zeroed out when the new amortization period takes effect, giving plans a "fresh start."

SPECIAL FINANCIAL ASSISTANCE FOR MULTIEMPLOYER PLANS

Before the passage of the ARPA, many multiemployer plans and the federal insurance program run by the agency backstopping those plans were in financial crisis. According to the Pension Benefit Guaranty Corp. (PBGC)'s **2019 Projections Report**, 124 of the 1,400 multiemployer plans insured by the agency were on pace to run out of money within 20 years. In addition, the PBGC said its multiemployer program was expected to become bankrupt by fiscal year 2026.

The ARPA provides $86 billion of stimulus and gives the PBGC authority to distribute funds as grants—not loans—to ailing plans that meet one of the following conditions:

- The plan is in critical and declining status in any plan year starting in 2020 through 2022
- The plan has been approved to suspend benefits under the Multiemployer Pension Reform Act of 2014 (MPRA) by March 11, 2021
- The fund is in critical status in any plan year starting in 2020 through 2022, is less than 40% funded and has more retirees than active participants
- The plan became insolvent after December 14, 2014, but is not fully frozen or terminated.

The ARPA also provides other modifications and allows the PBGC to prioritize multiemployer plans that are within five years of failure, have more than $1 billion in unfunded liabilities or previously reduced benefits under the MRPA. The PBGC is required to issue regulations or guidance on these and other requirements within 120 days of the ARPA's enactment. In addition, the ARPA increased PBGC premiums for multiemployer plans to $52 per participant starting in 2031.

BDO INSIGHT: Before Making Changes, Think Strategically About Your Plan

The ARPA provides much-needed assistance to multiemployer plans in financial distress and valuable funding relief to single-employer plans. But while ARPA lowers the minimum requirements for single-employer plan contributions, it is important to remember that contributing above these levels could potentially lower PBGC premiums or help fund a plan that may eventually be terminated. Plan sponsors should review their plan's unique situation and understand the benefits and drawbacks involved. Your BDO representative is able to explain the changes to help you decide how to move forward.

Navigating the Complexities of Nonqualified Deferred Compensation Plans

Employers are continuously looking for ways to enhance their ability to attract and retain top talent. This need will likely become more heightened as the economic recovery from the COVID-19 pandemic picks up steam and the labor market tightens.

Defined contribution and defined benefit plans play an important role in a company's employee benefits offering, but many companies look for additional tools to enhance the total compensation package for key employees. Nonqualified deferred compensation (NQDC) plans are one such tool.

While NQDC plans are common among U.S. companies, some employers may not be aware of the many complexities NQDC plans entail or the high degree of flexibility they offer. Designing and implementing an NQDC plan to maximize its usefulness as a recruiting and retention tool requires understanding the unique compliance requirements and other nuances of these plans and communicating the risks and tax implications effectively to prospective and current employees.

QUALIFIED VS. NONQUALIFIED RETIREMENT PLANS

Employers offer NQDC plans primarily as a way for highly paid employees to save more for retirement in a tax-deferred manner beyond the limits of qualified defined contribution plans. For 2021, employees may contribute up to $19,500 to a 401(k) plan and the total employee and employer contribution limit is $58,000, plus an additional $6,500 for employees age 50 or older. These limits can make it difficult for highly compensated employees to reach the recommended 12% to 15% of pay that many financial planners recommend saving for retirement each year. Furthermore, the ability to defer pay to years when their income is lower can be very beneficial for employees looking to minimize their overall tax liability.

Employers can decide which employees are allowed to participate in an NQDC plan. Unlike qualified plans, NQDC plans impose no discrimination or other compliance tests, so employers don't need to worry about the balance of highly compensated vs. non-highly compensated employees in the plan.

Employers have significant flexibility in structuring NQDC plans. These plans can be designed to provide the same investment options and matching contribution or vesting schedules as defined contribution or defined benefit plans—but they can also have radically different structures. Bonuses, in-kind benefits such as cars or homes, discounted stock, salaries and other types of incentive arrangements can all be deposited into an NQDC plan.

POTENTIAL DRAWBACKS OF NONQUALIFIED PLANS

While the ability to defer income and taxes may seem appealing, NQDC plans have potential drawbacks that employers and employees should be aware of, including potential penalties and risk of loss.

In 2004, Congress added Section 409A to the Internal Revenue Code (IRC), partly as a result of the Enron scandal. Section 409A is intended to prevent executives from accessing funds in NQDC plans before the company goes bankrupt. Section 409A stipulates that an NQDC plan must have a written agreement outlining the amount deferred, as well as when and how it will be paid out. It imposes steep penalties if arrangements are violated. Specifically, violations result in deferred amounts becoming immediately taxable and also subject to a 20% penalty.

Unlike funds in qualified retirement plans, funds in NQDC plans are not protected from creditors. Employees who defer compensation may never recoup that money if the company goes bankrupt. This is because, by law, and from the standpoint of a creditor, the money is part of the company's general assets until it is distributed to the employee. In general, employees cannot take the money out of the plan early or take loans against the assets (although there is some limited ability to access amounts in certain financial hardship circumstances).

From the employer's perspective, it is important to realize that the company does not get to claim the corporate tax deduction for the deferred compensation until it is distributed to the employee. Also, rectifying mistakes made in administering NQDC plans is not as easy as doing so with qualified plans. Employers that make mistakes with their 401(k)s, such as late remittances or overpayments to accounts, can use the IRS Employee Plans Compliance Resolution System (EPCRS) to avoid penalties in many cases. While there is a correction program for NQDC plans, it is not nearly as flexible or favorable as EPCRS.

BDO INSIGHT: Explore All Your Options

Companies considering an NQDC plan should realize that there are many decisions to make when designing a viable NQDC plan, including which employees will participate, how vesting or payout schedules will be determined and what amounts or types of compensation will be included. Just as important, for an NQDC plan to serve its role as a recruiting and retention tool, employers should ensure that prospective and current employees understand the details of the plan—including the potential tax benefits as well as the risks and limitations.

In addition, employers and employees should have a firm understanding of the Section 409A rules and consequences.

Employers looking for ways to allow certain employees to contribute more to their retirement savings than the IRS limits for qualified plans shouldn't assume that NQDC plans are the best way to accomplish this goal. For example, cash balance plans—a type of defined benefit plan that has elements of a defined contribution plan—can be paired with a 401(k) and may be an attractive option for some companies.

BDO can walk you through the options and help you determine whether NQDC plans are a fit for your organization.

CONTACT:

BETH LEE GARNER
Assurance Partner,
National Practice Leader Employee Benefit Plan Audits
404-979-7143 / bgarner@bdo.com

NICOLE PARNELL
Managing Director, Retirement
Plan Services Leader
757-640-7291 / nparnell@bdo.com

MICHAEL BELONIO
Assurance Director,
Northeast Region Practice Leader
212-404-5516 / mbelonio@bdo.com

MARY ESPINOSA
Assurance Director,
West Region Practice Leader
714-668-7365 / mespinosa@bdo.com

JODY HILLENBRAND
Assurance Director,
Southwest Region Practice Leader
210-424-7524 / jhillenbrand@bdo.com

LUANNE MACNICOL
Assurance Partner,
Central Region Practice Leader
616-802-3364 / lmacnicol@bdo.com

SETH PITASKY
Actuarial Managing Director, Compensation and Benefits
216-325-1721 / spitasky@bdo.com

JOANNE SZUPKA
Assurance Director,
Atlantic Region Practice Leader
215-636-5591 / jszupka@bdo.com

JAM YAP
Assurance Director,
Southeast Region Practice Leader
404-979-7205 / jtyap@bdo.co

WENDY SCHMITZ
Assurance Director
704-887-4254 / wschmitz@bdo.com

DARLENE BAYARDO
National Assurance Director
714-913-2619 / dbayardo@bdo.com

CHELSEA SMITH BRANTLEY
National Assurance Senior Manager
404-979-7162 / csmith@bdo.com

ALEX LIFSON
Principal, Compensation and Benefits National Leader
617-239-7009 / alifson@bdo.com

ABBY LADOLCETTA
Audit Senior Manager
616-389-8697 / aladolcetta@bdo.com