ERISA ROUNDUP

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

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BDO

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

Mid-year is a great time to reflect on key accomplishments for the first half of the year and finalize your plans for the second half. To assist in this process, we have assembled a set of our most recent insights and resources.

In this edition of our ERISA Roundup, you'll find information on the scope and potential implications on the Department of Labor (DOL) proposed rule on Environment, Social and Governance (ESG) investing. We also explore how recent changes can provide plans sponsors an opportunity to reexamine their current de-risking strategy, what factors to consider during an mergers and acquisition (M&A) activity, and how to determine where you are on your human resources journey.

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

Wishing you all the best,

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

IN THIS ISSUE

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2022 Deadlines and Important Dates

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

JULY

- **14** / Action: 401(k) 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.
- **25** / Action: File PBGC Form 200 by July 25, 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 2022 contribution due for defined benefit pension plans.
- **31** / Action: Preapproved defined contribution plans must sign and date restated plan documents by July 31.

AUGUST

- **1** / Action: Large plan audit must be completed by August 1 to avoid requesting Form 5500 extension.
- **1** / Action: Form 5500 and Form 8955-SSA must be filed by August 1.
- **1** / Action: To request a Form 5500 extension, Form 5558 must be filed on paper by August 1.
- **15** / File PBGC Form 10, by Aug 15, 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.
- Best Practice: Plans that failed compliance testing may take this mid-year opportunity to run compliance tests.

SEPTEMBER

- **15** / Fund: If an extension was filed, Sept. 15 is the deadline to fund employer contributions for Partnerships and S-Corporations.
- **15** / Fund: Minimum funding deadline for single and multi-employer defined benefit plans.
- **15** / Sept 15, last date to make 2021 contributions for defined benefit pension plans.
- **26** / Action: File PBGC Form 200 by Sept. 26, 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** / Distribution: Annual notices to participants must be given no earlier than Oct. 1 and no later than Dec 1, including 401(k) Plan Safe Harbor Match Notice, Automatic Contribution Arrangement Safe Harbor, Automatic Enrollment and qualified default investment alternative.
- **17** / File PBGC Form 10, by Oct 17, if a defined benefit plan (of any size) 1) missed its Sept 15 required contribution, 2) the contribution is still unpaid as of Oct 15, 3) the contribution could not have been met with a Prefunding or Carryover Balance election and 4) a PBGC Form 200 was not already filed for the same event.
- **15** / Oct 15, possible third quarter 2022 contribution due for defined benefit pension plans.
- **17** / Action: Oct. 17 is the extended deadline for filing Form 5500 and Form 8955-SSA.
- **17** / Action: Oct. 17 is the extended deadline for filing individual and C-Corp tax returns.
- **17** / Fund: If an extension was filed, Oct. 17 is the deadline to fund employer contributions for C-Corporations and Sole Proprietors.
- **17** / Action: Oct. 17, multi-employer defined benefit plans file PBGC Comprehensive Premium document and pay $32 per participant flat-rate premium.
- **17** / Action: Oct. 17 to open a Simplified Employee Pension (SEP) plan for extended tax filers.
- **25** / Action: File PBGC Form 200 by Oct. 25, if plan sponsor of a single-employer defined benefit plan does not make the Oct. 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **31** / Distribution: Single-employer defined benefit plans that are less than 60 percent funded must inform participants by October 31 or 30 days after the benefit restriction is determined.

NOVEMBER

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

DECEMBER

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

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

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

Stay Up to Date with Our Podcast, BDO Talks ERISA

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

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

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

RECENT EPISODES

Episode 18: Employee Culture: The Differentiator in Today's Workplace

Beth Garner talks with David Friedman, founder and CEO of High Performing Culture, LLC and author of Fundamentally Different and Culture by Design: How to Build a High-Performing Culture, Even in the New Remote Work Environment. David shares why culture is the biggest opportunity for companies to have a competitive and sustainable edge against their competitors and explains how leaders can create and implement their culture plan.

LISTEN TO EPISODE 18 NOW

Episode 19: Retirement Readiness for Women

In this episode, Beth Garner and Joanne Szupka sit down with Michele Burkholder, CFP®, a financial adviser with the Burkholder Team, and Morgan Stewart, a finance professional working with Michele, to discuss women and their financial planning. Both Michele and Morgan have a mission to educate and guide individuals, families, and business owners regarding financial decisions and give sound, personal financial advice for every life stage.

LISTEN TO EPISODE 19 NOW

Episode 20: Two Key Takeaways from the 2022 AICPA EBP Conference

Beth Garner and Joanne Szupka discuss two hot topics from the 2022 AICPA Employee Benefits Plans Conference, which was held in Nashville, TN. First, they explore the meaning of Environmental, Social and Governance (ESG), along with the implication of the Department of Labor's (DOL's) 2021 ruling on ESG investing. Next, they looked at cybersecurity, including the scope of the recent DOL issued guidance and the alarming stats that underscores the importance of being diligent.

LISTEN TO EPISODE 20 NOW

Plan Sponsor Alert: M&A Could be Your Next Challenge. Are You Ready?

Last year, despite pandemic fears, companies took advantage of low interest rates to create an unprecedented increase in mergers and acquisition (M&A) activity. On a global level, more than 63,000 transactions worth $5.9 trillion closed in 2021, with the U.S. leading the way in deals worth $2.6 trillion, according to **Refinitiv**, a British financial market data firm. Rising interest rates, ongoing geopolitical concerns and other factors may slow the pace of deals in 2022, but many analysts expect M&A activity to remain high for the foreseeable future.

Company retirement plans and their participants are typically an afterthought when M&A activity is happening at such a rapid pace. While much can wait until the deal is done, it is important to focus on a few areas that plan sponsors often miss in diligence or are surprised to learn about when acquiring a company or being acquired themselves. For additional insight on operational issues associated with mergers and acquisitions, see past articles to help plan sponsors **before** and **after** a merger or acquisition.

FIRST, WHO IS IN CHARGE?

It may sound elementary but clarifying which company/plan sponsor is the acquirer and identifying the specific team leading the transaction is very important for managing the benefit plans part of the M&A equation. This group needs to decide who is going to make the benefits decisions and how benefits are going to be offered going forward.

Following a thorough analysis of any current plans in place, the team should decide whether they will terminate the target company's plan, operate both plans separately or merge the plans — paths that we described in more detail in our **previous article**. It is also important to review whether any newly established or legacy plans will be able to pass coverage and non-discrimination testing.

If there are any concerns about the plan being tainted — in other words, featuring elements of non-compliance, a full compliance review should be completed during the sign to close period (usually anywhere from 30-60 days after the deal is signed). The compliance review process should include detailed review of items such as plan documents, Forms 5500, employee census data and coverage testing to assess whether there are points of non-compliance.

It also can be valuable to do a "winners/losers" analysis to understand which participants may benefit the most versus have take-aways under the new plan. After this assessment, the team can decide whether and how to compensate those who "lose" in the new plan for example, through an increased benefits, salary increase, bonus, etc.

SECOND, MANAGING SERVICE PROVIDERS

One challenge with service providers is that once a merger or acquisition is in motion, many vendors become less invested in supporting the plan because they assume they will no longer be servicing the plan post-acquisition. In most cases, they will eventually do their part but often won't be very responsive or provide hands-on support to determine how to bring the new plan together.

Savvy plan sponsors find service providers with a vested interest in the new plan. Such a provider should have a handle on deadlines, compliance issues and any important details that cannot be missed in the new plan. For example, it is important to have a strong understanding of the Internal Revenue Service's **Rev. Rule 2004-11**, also known as the coverage transition rule, which deals with non-discrimination requirements during an ownership change.

Another helpful step is to ask the service provider for a temporary team member familiar with special events such as plan mergers or terminations, as applicable. Often day-to-day teams are not familiar with the extensive list of actions which need to be taken which can result in project delays and/or compliance risks.

THIRD, COMMUNICATION TO PARTICIPANTS IS PARAMOUNT

Plan sponsors need to clearly communicate with employees how their benefits will be affected by a merger or acquisition. Depending on how the plans are handled going forward, these events can have a significant impact on participants — for example, some participants may need to pay off loans if a plan is terminated, causing an unexpected taxable event for those individuals. If circumstances are not communicated clearly and effectively, plan participants can be caught off guard, creating challenges for both participants and sponsors.

Employees often do what is easiest, which is typically inaction. Plan sponsors have recognized this and the use of auto-enrollment in 401(k) plans and annual auto-increases have significantly increased both participation and employee contributions to plans. Best practice is to assume many employees will not take action and structure the process in such a way these employees will not be disadvantaged.

BDO INSIGHT: Set yourself up for Success

Transitioning plans into a new organization takes a lot of effort. Now is the time to get organized — even if there isn't a deal looming on the horizon today. While the basics of having a list of all service providers, testing results and making sure documents and operations mirror each other is essential, your philosophy on how you want your plan participants to receive benefits moving forward should also be a core focus.

Plan Sponsor Alert: Revisiting De-Risking Options

Thanks to better returns and an uptick in discount rates used to value plan liabilities, defined benefit plans' funding statuses have improved to some of their highest levels since the Great Recession. Many plan sponsors are eager to preserve these gains and want to take risk off their balance sheet by implementing de-risking strategies. Because of the recent changes in funding levels and the various de-risking methods at their disposal, plan sponsors should use this opportunity to reexamine their current approach to best fit their goals for their plans and participants.

DETERMINING THE RIGHT DE-RISKING STRATEGY

We have written about de-risking in **previous articles**, but the environment and appetite for de-risking has changed significantly over the past few years. De-risking activity saw a brief slowdown before the COVID-19 pandemic, but nearly all plan sponsors responding to **MetLife's 2021 Pension Transfer Risk poll** said they plan to completely divest of their companies' pension liabilities in the future.

When considering a de-risking strategy, plan sponsors should first review the plan's goals and study what drives the need to de-risk. It is important to consult with advisors to determine how assets and liabilities can be controlled—and at what price. Next, plan sponsors should look at the various available options. Out-of-plan approaches include lump-sum payouts, annuity buy-outs, and full plan terminations. In-plan methods include liability driven investments (LDI), in-plan annuities, and freezing plan benefits or freezing the plan to new participants.

Buy-outs: Buy-out products, like annuities, transfer some or all pension liabilities to an insurer and reduce the overall risk to the plan sponsor. U.S. corporate pension plan buy-outs soared to $34.2 billion in 2021, up 37 percent from 2020 and their highest level since 2012, according to a **LIMRA Secure Retirement Institute** study released in March 2022. LIMRA Found that 47 percent of plan sponsors are very interested in a buy-out deal in the future, a 41 percent increase from 2018. A complete termination of a pension plan usually involves a combination of paying participants lump sums and purchasing annuity products.

Buy-ins: Buy-in products are also usually annuity products. But instead of completely transferring liabilities to an insurer, the pension invests in annuity products which offer more stable returns and lower the risk of investment downturns.

Liability-driven investing (LDI): Buy-outs can be an expensive solution for many plan sponsors, so a more attractive approach may be liability-driven investing — investment strategies to make the underfunding in a pension more predictable. These strategies are intended to reduce the effects of market downturns, but at the same time they can also dampen the benefits of market gains. Many plan sponsors already have some kind of LDI strategy in place, but recent changes in the market and rising interest rates may require plans to take a second look at how these factors have altered their course.

A strong LDI approach should create a customized asset allocation that matches the current and future liabilities of a pension plan. But some factors are beyond a plan sponsor's control. The war in Ukraine, rising gas and commodity prices, and lower expected returns on investments are examples of new variables to consider in just the first few months of this year. Plan sponsors may need to reach outside their existing LDI toolkit for other ways to stabilize the balance between assets and liabilities. Plan sponsors should look for a customized approach that fits the needs of their unique situation.

COVID-19'S IMPACTS ON MORTALITY TABLES

A recent **Milliman** study found that between March and December 2020, total deaths were 21 percent higher than expected, and 80 percent of the increase may be attributed directly to the pandemic. It is still too early to tell whether the pandemic will impact the future of mortality tables used to determine liabilities, but plan sponsors whose workforces have been significantly affected should consult with their actuary to determine whether accommodations need to be made.

FIND THE BEST APPROACH TO FIT YOUR PLAN AND ITS PARTICIPANTS

A defined benefit plan's unfunded liability may be the biggest risk on an organization's balance sheet. When it comes to de-risking strategies, every situation is unique and there is no one-size-fits all strategy. Making these decisions take careful consideration. Your BDO representative can help sift through the available options to help you determine which de-risking approach suits your specific situation.

DOL Alert: Proposed Regulation on ESG Investing and Shareholder Rights

The Department of Labor (DOL) is preparing to finalize a proposed rule that changes the way environmental, social and governance (ESG) factors are viewed in a plan sponsor's investment process and proxy voting methods. The proposal, which was issued in October 2021, aims to help plan sponsors understand their responsibilities when investing in ESG strategies and makes significant changes to two previously issued ESG rules.

Here, we provide an update on the DOL's proposed rule and seek to help plan sponsors understand their potential new responsibilities when considering ESG investments.

BACKGROUND ON ESG RULES

For many years, the DOL has considered how non-financial factors, such as the effects of climate change, may affect plan sponsors' fiduciary obligations. Amid an increasing focus on ESG investments, the Trump administration issued a **final rule** on ESG in November 2020 that required plan fiduciaries to only consider financial returns on investments — and to disregard non-financial factors like environmental or social effects. The rule also banned plan sponsors from using ESG investments as the Qualified Default Investment Alternative (QDIA).

A **separate ruling issued** in December 2020 said that managing proxy and shareholder duties (for investments within the plan) should be done for the sole benefit of the participants and beneficiaries—not for environmental or social advancements. It also stated that fiduciaries weren't required to vote on every proxy and exercise every shareholder right.

In March 2021, the Biden Administration said it would not enforce the previous year's rulings until it finished its own review. The current proposed rule is the result of that research.

OVERVIEW OF THE NEW PROPOSED ESG RULE

In October 2021, the DOL proposed a new rule, "**Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.**" According to the proposed rule, fiduciaries may be required to consider the economic effects of climate change and other ESG factors when making investment decisions and exercising proxy voting and other shareholder rights. The proposal states that fiduciaries must consider ESG issues when they are material to an investment's risk/return profile. The rule also reversed a previous provision on QDIAs, paving the way for ESG investment options to be used in automatic enrollment as long as such investment options meet QDIA requirements.

The new ESG rule also made several changes to fiduciaries' responsibilities when exercising shareholder rights. First, it changed a provision on proxy voting, giving fiduciaries more responsibility in deciding whether voting is in the best interest of the plan. Second, it removed two "safe harbor" examples of proxy voting policies. Next, the proposed rule eliminated fiduciaries' need to monitor third-party proxy voting services. Lastly, the proposal removed the requirement to keep detailed records on proxy voting and other shareholder rights.

In addition, the DOL updated the "tie-breaker test" to allow fiduciaries the ability to choose an investment that has separate benefits (e.g., ESG factors) if competing investments equally serve the financial interests of the plan.

COMMENT LETTER ANALYSIS SHOWS BROAD SUPPORT FOR THE PROPOSED RULE

The DOL received more than 22,000 comment letters for the proposed regulation. Ninety-seven percent of respondents support the proposed changes according to an analysis of the comment letters by the Forum for Sustainable and Responsible Investment (US SIF), a membership association that promotes sustainable investing. While some respondents asked the DOL to revisit the tie-breaker provision and other specifics of the proposed rule, many respondents agreed that the proposed rule clears the way for fiduciaries to consider adding ESG investment options to benefit plans.

BDO INSIGHT: Consider how the proposed ESG rule affects your plan today

Based on the typical timeline for similar rule changes, the DOL is expected to issue its final version of the proposed rule by mid- to late-2022. This means that plan sponsors shouldn't have to wait long for clarification on their ability to add ESG investments to their plans. To prepare for the potential changes, plan sponsors should review the proposed rule and consider creating a prudent selection process that reviews all aspects that are relevant to an investment's risk and return profile. As always, documentation is a critical step in this process.

The HR Readiness Checklist

Has your emerging business been prioritizing the human resources (HR) function to maintain an edge when it comes to attracting and retaining talent, as well as scaling up? Are you prepared to tackle the shifting expectations of today's workforce and enhance your HR readiness to remain competitive?

BDO's Human Resources Readiness Checklist can help you determine how prepared your organization is to meet emerging requirements and develop best practices for establishing an HR function.

Answer each question in the three sections and we'll tally your score at the end so that you can see where you stand. Then download our HR Readiness Report Card to find out where to go from there.

Here's what you'll get after going through the checklist:

EMPLOYMENT COMPLIANCE SCORE
Tells you how informed you are related to employment regulations basics.

PAYROLL SCORE
Tells you your preparedness level when it comes to compensation structures and hiring.

BENEFITS SCORE
Tells you your readiness level when it comes to benefits strategy and competitiveness.

CLICK HERE TO TAKE THE ASSESSMENT ▶

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