ERISA ROUNDUP

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

Q4 2018

BDO

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

As your team enters a new calendar year, there is an opportunity to set new goals and directives for the way your employee benefit plans are managed.

This year, our team is setting goals as well. On top of continuing best-in-class support for our clients and valuable insights on emerging trends, we vow to provide more learning opportunities as well as help ensure your team is aware of deadlines and industry events.

Check back often to www.bdo.com/erisa for the latest news and resources, and Happy New Year from our team to yours.

Sincerely,

BETH GARNER
National Practice Leader, ERISA

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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2019 Deadlines and Important Dates for Plan Sponsors

JANUARY 2019

- **13** / File Form 5500 Schedule SB Posting for single-employer defined benefit plans by Jan. 13.
- **14** / File Form 5500 Schedule SB Posting for multi-employer defined benefit plans by Jan. 14.
- **15** / Census data due Jan. 15. Plan sponsor confirms the accuracy of the prior year's census data to the recordkeeper. This information is used for ADP/ACP testing.
- **25** / File PBGC Form 200 by Jan. 25, Notice of Failure to Make Required Contributions, for single-employer defined benefit plans.
- **30** / Single-employer defined benefit plans that are less than 60 percent funded must inform participants by Jan. 30 or 30 days after the benefit restriction is determined.
- **31** / Distribute IRS Form 1099-R to participants by Jan. 31.
- **31** / Form 945 must be filed with the IRS by Jan. 31.
- **31** / File Form 1096 paper transmittal by Jan. 31 for 2018 tax year.

FEBRUARY 2019

- **14** / File PBGC Form 10 by Feb. 14, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **15** / Review and approve compliance testing results sent by plan administrator by Feb. 15.
- **28** / File PBGC form 1-ES, the estimated premium payment for plans with 500 or more participants, by Feb. 28.
- **28** / Employers choosing to file paper Form 1094-C must do so by Feb. 28, to prove compliance with the Employer Shared Responsibility Mandate of the Affordable Care Act (ACA)

MARCH 2019

- **1** / Multiple employer welfare arrangement (MEWA) plans must file the annual form M-1 by March 1.
- **4** / Distribute Form 1095-C to employees by March 4, to give information on health care coverage for 2018. (IRS changed this date from Jan. 31.)
- **15** / Highly compensated employees who fail ADP/ACP test for prior plan year must have refunds processed by March 15.
- **15** / Partnerships and S Corporations that are not getting an extension must fund contributions by March 15 and receive tax deduction for the prior year.
- **31** / Recordkeeper (or other responsible party) completes and files Form 1099-R with the IRS by March 31.

APRIL 2019

- **1** / Hire auditor (if needed) by April 1.
- **1** / Employers choosing to file electronic Form 1094-C must do so by April 1, to prove compliance with the Employer Shared Responsibility Mandate of the Affordable Care Act (ACA)
- **1** / April 1 Deadline for 5 percent business owners and terminated participants who turned 70 ½ in the prior year to receive their required minimum distribution (RMD).
- **15** / Corporations and sole proprietors that are not getting an extension must fund contributions by April 15 and receive tax deduction for the prior year.
- **15** / IRA contributions for the prior tax year must be funded by April 15.
- **15** / Participants who contributed over 402(g) or 415 limits in the previous year must be refunded the excess amount by April 15.
- **15** / File PBGC Form 4010 by April 15, Notice of Underfunding for single-employer defined benefit plans.
- **25** / File PBGC Form 200 by April 25, if plan sponsor of a single-employer defined benefit plan does not make the April 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **30** / Send annual funding notice to participants of single- and multi-employer defined benefit plans by April 30.

MAY 2019

- **15** / File PBGC Form 10 by May 15, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **15** / Defined contribution plans must send fee and benefit information to participants by May 15.

JULY 2019

- **1** / Plans with publicly traded employer stock must file Form 11-K with the Securities and Exchange Commission by July 1.
- **25** / File PBGC Form 200 by July 25, if plan sponsor of a single-employer defined benefit plan does not make the July 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **31** / Large plan audit must be completed by July 31 to avoid requesting Form 5500 extension.
- **31** / IRS Form 5500 must be filed by July 31.
- **31** / To request a Form 5500 extension, Form 5558 must be submitted by July 31.
- **31** / Pay Patient-Centered Outcomes Research Institute (PCORI) fee by July 31. Self-insured health plans must pay $2.45 per person (covered by health plan).

AUGUST 2019

- **14** / File PBGC Form 10 by Aug. 14, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **31** / Plans that failed compliance testing may take this mid-year opportunity to run compliance tests. Aug. 31

SEPTEMBER 2019

- **15** / If an extension was filed, Sept. 15 is the deadline to fund employer contributions.
- **15** / Minimum funding deadline for single- and multi-employer defined benefit plans.
- **25** / 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** / Sept. 30, Summary Annual Report sent to participants with Dec. 31 plan year end.

OCTOBER 2019

- **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 Form 5500.
- **15** / Oct. 15 is the extended deadline for filing individual and C-Corp tax returns.
- **15** / Oct. 15, 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.
- **25** / 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.

NOVEMBER 2019

- **14** / File PBGC Form 10 by Nov. 14, Post-Event Notice of Reportable Events for single-employer defined benefit plans.

DECEMBER 2019

- **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 completed by Dec. 31.
- **31** / Required minimum distributions for participants age 70 ½ must be completed by Dec. 31 for calendar plan years.
- **31** / Plan sponsors must amend plan documents by Dec. 31 to account for any discretionary changes made during the year.

CONTRIBUTION PLAN LIMITS AND OTHER ROLLING NOTICES FOR 2019

In addition to those important deadlines and dates, plan sponsors should be aware of the contribution plan limits and other rolling notices for 2019:

- Employee salary deferral limits for 401(k), 403(b) and 457 plans will be $19,000. Age 50 catch-up contribution limit stays unchanged at $6,000.
- Health Savings Account contribution limit is $3,500 (single) and $7,000 (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 stays at $1,000.
- Limitation for the annual benefit under a defined benefit plan under Section 415(b)(1)(A) will be $225,000.
- Newly eligible employees must receive a Summary Plan Description (SPD) within 90 days.
- Provide quarterly statements and fee information to participants.

ERISA Spending Accounts: Clearing the Confusion

The Employee Retirement Income Security Act (ERISA) allows plan sponsors to maintain spending accounts funded by revenue generated by mutual fund holdings to help pay for the costs of running a 401(k) Plan. While these spending accounts—also known as revenue-sharing accounts, budget accounts, ERISA buckets or plan expense reimbursement accounts—can be helpful in defraying plan expenses, it's important that plan sponsors understand the details of revenue-sharing agreements and the fiduciary responsibilities they entail.

This can be a challenge, especially for smaller plans. Not only do many plan sponsors not fully understand the mechanics of how spending accounts work, it's not uncommon for administrators to not even realize that the funds they offer have revenue-sharing agreements. This can cause sponsors to neglect their fiduciary duty to track and provide transparency for funds in spending accounts and how that revenue is used—opening the plan up to lawsuits by plan participants.

To help clear up this confusion, we answer some of the most common questions that plan sponsors have about ERISA spending accounts.

WHAT IS AN ERISA SPENDING ACCOUNT?

To understand ERISA spending accounts, it's important to know how the revenue is generated. Some investment options—usually mutual funds—offer rebates or paybacks for using their investment funds. The payback is built into the expense ratio for the fund and is returned to the recordkeeper. In turn, the recordkeeper takes its fee for hosting the mutual fund and then the remainder goes into a revenue-sharing account that is directed by the plan sponsor to either pay for plan expenses or be allocated as earnings to participants with 401(k) accounts.

Often, plan sponsors are not aware that they have a revenue-sharing account, or they think that the recordkeeping is free. This is mostly because recordkeeping fees are taken out of the fund's earnings (or the expense ratio).

WHAT CAN THE ACCOUNT PAY FOR?

Typically, funds in the ERISA spending account are allocated as earnings to the participant with a 401(k) Plan balance or are used to pay other 401(k) Plan operational expenses, including:

- Audit fees
- Third Party Administration services including annual discrimination testing
- Transactional expenses, such as calculating hardship, QDRO and loan expenses
- Legal and other annual professional fees

The account can't pay settlor fees, amendment to plan fees or costs associated with adding voluntary features to the plan. In addition, ERISA spending account balances can't be carried over to the next plan year.

WHAT HAPPENS TO EXCESS REVENUE?

If there is excess revenue in the account after these expenses are paid, plan sponsors typically return it to participants. The plan document should outline how excess revenue is distributed to participants. Some plans distribute it to all participants while other plans distribute it only to participants who invest in funds with revenue-sharing agreements.

SHOULD MY PLAN HAVE AN ERISA SPENDING ACCOUNT?

When selecting any investment option to be included in a plan, sponsors need to ensure that the fees for the investment funds are reasonable. This is a fiduciary decision that plan sponsors make for all funds, regardless of whether they offer spending accounts. In some cases, including a fund with higher expenses and revenue-sharing may be completely justified by the fund's expected returns or other factors.

Today, only 27 percent of plans have ERISA spending accounts, according to the Plan Sponsor Council of America's 60th Annual Survey of Profit Sharing and 401(k) Plans. In addition to the rising popularity of exchange-traded funds (ETFs), index funds and other lower-cost investment vehicles that typically don't offer revenue sharing, another reason that plan sponsors are moving away from this approach are the rules related to transparency and documentation when selecting funds.

Plan sponsors using spending accounts should clearly document the reasons for choosing funds that offer revenue sharing. Several lawsuits have come before federal courts where participants have charged that investments that provide revenue sharing were not in their best interest.

BDO INSIGHT: KNOW YOUR RESPONSIBILITIES FOR SPENDING ACCOUNTS

Navigating the complexities of asset managers, funds and share types to decide which investment options to include in a company's retirement plan can be a daunting process. Spending accounts and the widespread confusion about how they work only adds to the challenge.

Even though spending accounts are declining in popularity, they shouldn't be an afterthought for plans' investment committees. That is why it's important for plans to work with investment advisors who have experience working with these types of arrangements. At a minimum, plan sponsors need to understand the mechanics of any revenue-sharing agreement they enter into and be able to justify why the fund's fees are reasonable. Sponsors also need to understand their responsibilities for tracking and distributing excess revenue.

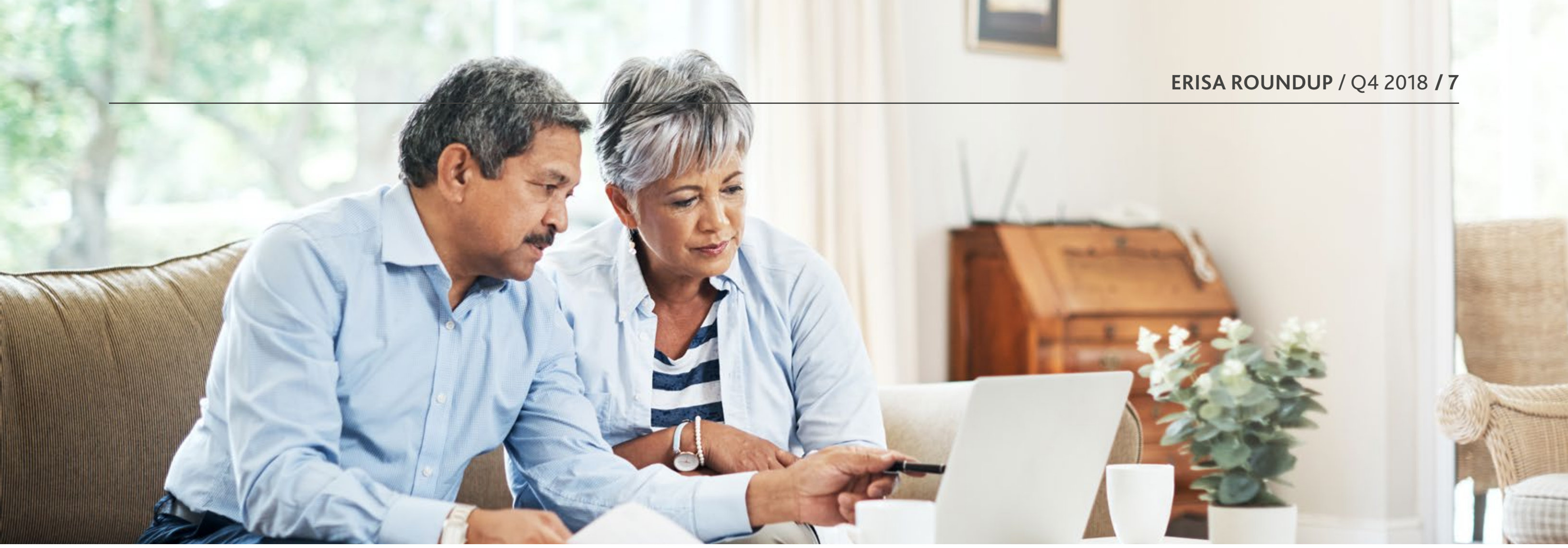
It's important to revisit fee arrangements when adding a new investment or changing service providers. Plan sponsors are required to be aware of fees being paid—even costs paid directly by participants. There are no "free" services, so plan sponsors with ERISA spending accounts need to frequently determine whether this strategy provides value to the plan and its participants.

While this can be a complicated topic, your BDO representative can help you better understand how ERISA spending accounts may impact your 401(k) plan.

2019 COLA For Qualified Retirement Plans

The table below summarizes key 2019 cost-of-living adjustments (COLA) for pension plans and selected other items announced by the Internal Revenue Service. In general, annual compensation amounts and limits for elective deferrals were increased, while catch-up contribution limits remain unchanged. The Social Security Administration separately announced the taxable wage base for 2019, which is also included below.

CODE SECTION	2019	2018	2017	2016	2015
401(a)(17)/404(l) Annual Compensation	$280,000	$275,000	$270,000	$265,000	$265,000
402(g)(1) Elective Deferrals	19,000	18,500	18,000	18,000	18,000
408(k)(2)(C) SEP Minimum Compensation	600	600	600	600	600
408(k)(3)(C) SEP Maximum Compensation	280,000	275,000	270,000	265,000	265,000
408(p)(2)(E) SIMPLE Maximum Contributions	13,000	12,500	12,500	12,500	12,500
409(o)(1)(C)(ii) ESOP Limits	1,130,000 225,000	1,105,000 220,000	1,080,000 215,000	1,070,000 210,000	1,070,000 210,000
414(q)(1)(B) HCE Threshold	125,000	120,000	120,000	120,000	120,000
414(v)(2)(B)(i) Catch-up Contributions	6,000	6,000	6,000	6,000	6,000
414(v)(2)(B)(ii) Catch-up Contributions	3,000	3,000	3,000	3,000	3,000
415(b)(1)(A) DB Limits	225,000	220,000	215,000	210,000	210,000
415(c)(1)(A) DC Limits	56,000	55,000	54,000	53,000	53,000
416(i)(1)(A)(i) Key Employee	180,000	175,000	175,000	170,000	170,000
457(e)(15) Deferral Limits	19,000	18,500	18,000	18,000	18,000
1.61-21(f)(5)(i) Control Employee	110,000	110,000	105,000	105,000	105,000
1.61-21(f)(5)(iii) Control Employee	225,000	220,000	215,000	215,000	215,000
219(b)(5)(A) IRA Contribution Limit	6,000	5,500	5,500	5,500	5,500
219(b)(5)(B) IRA Catch-Up Contributions	1,000	1,000	1,000	1,000	1,000
Taxable Wage Base for Social Security	132,900	128,700	127,200	118,500	118,500



Labor Department Proposes Rule to Expand Association Retirement Plans

Just more than half of working Americans have access to a 401(k) retirement plan, data from the Bureau of Labor Statistics show. That percentage drops to 46 percent for companies with fewer than 100 employees. To expand access and offer a more efficient retirement plan to small businesses, the Department of Labor (DOL) has proposed a rule that would expand the definition of a pooled strategy called association retirement plans.

While the proposal refers to them as "association retirement plans," these types of retirement plans are better known as multiple employer plans (MEPs). They are currently only available to an employee organization or certain employers in the same industry.

The rule, proposed in late October 2018, would expand the MEP definition, currently found in section 3(5) of the Employee Retirement Income Security Act (ERISA). The proposal would allow unaffiliated businesses in various industries, but with common economic interests, to join together and create a retirement plan for all employees under a single administrator. The rule, if finalized, would also allow businesses that are within certain geographic conditions to create a MEP.

Currently, small businesses are often discouraged by the cost and complexity of offering a retirement plan, U.S. Secretary of Labor Alexander Acosta said when announcing the proposal.

The new rule would expand opportunities for employers to offer options to the 38 million private-sector employees who don't have access to a retirement plan at work.

The proposal comes after President Donald Trump's Aug. 31, 2018, executive order 13847, Strengthening Retirement Security in America. This order directed the DOL and Treasury Department to look for ways to help employers sponsor retirement plans. While Treasury has not issued any proposals at this time, it is expected that the department will issue guidance within 180 days of the order.

As with all proposed rules, the DOL is seeking comments from the public. Written comments are due Dec. 24, 2018.

Your BDO representative can help you understand how the proposed rule might affect you and determine whether joining a MEP would be a beneficial strategy for your workforce.

Update: The DOL received over 50 comments on the proposal. Stay tune for future updates. Comment letters to the DOL can be accessed here.

Qualified Plan Tax Savings Could Be Greater for Some Plan Sponsors Post-TCJA

The Tax Cuts and Jobs Act (TCJA) passed at the end of 2017 made significant changes for tax year 2018 and beyond. One such change was enactment of Section 199A which provides a deduction to non-corporate taxpayers based on certain qualified business income (QBI) generated by sole proprietorships, S corporations, and partnerships. This deduction, combined with other changes in the TCJA, may have the effect of reducing the tax advantages of making qualified plan contributions. However, for some plan sponsors, a qualified plan contribution may be more valuable now than ever.

As it relates to Section 199A it is important to cover a few of the basic rules before diving into how plan sponsors may benefit from enactment of this new deduction.

First, Section 199A may provide a deduction of up to 20% of QBI. It is important to distinguish QBI from net business income. While net business income may provide a reasonable starting point for the determination of QBI, a number of exclusions must be considered. For example, non-US sourced income and capital gains and losses are excluded from QBI. Determining a taxpayer's QBI can be complicated and it is important to understand that QBI may not be the same as net business income.

Second, the ability of a taxpayer to claim the Section 199A deduction may be limited to W-2 wages and qualified property associated with the generated QBI. For taxpayers filing joint tax returns with taxable income in excess of $415,000 ($207,500 for non-joint filing taxpayers) the Section 199A deduction will be limited to the lesser of (A) 20% of QBI or (B) the greater of (i) 50% of W-2 wages or (ii) 25% of W-2 wages plus 2.5% of the unadjusted basis immediately after acquisition of qualified property. It is important to note that this limitation is subject to a "phase in," and joint filing taxpayers reporting taxable income of less than $315,000 ($157,500 for non-joint filing taxpayers) are not subject to this limit. For taxpayers with taxable income between the upper and lower ends of the ranges, the limit is applied based on how far into the range taxable income falls.

Finally, the ability to claim the Section 199A deduction may be further limited to the extent the QBI is generated from a Specified Service Trade or Business (SSTB). Recently proposed regulations published under Section 199A provide much needed guidance intended to assist in determining whether or not a trade or business is an SSTB. However, oftentimes the determination of whether a trade or business will be considered an SSTB requires significant analysis. Once determined to be an SSTB, the rules will operate to disallow the deduction under Section 199A similar to the limitation previously described. Consequently, joint filing taxpayers with taxable income exceeding $415,000 ($207,500 for non-joint filing taxpayers) will not be able to claim any Section 199A deduction for QBI attributable to an SSTB. For joint filing taxpayers with taxable income below $315,000 ($157,500 for non-joint filing taxpayers) will not be subject to this SSTB exclusion. Taxpayers within the respective income ranges ($315,000 - $415,000 for joint filing taxpayer and $157,500 - $207,500 for all other taxpayers) will be subject to a similar phase in as described above.

With that background, we can now address determining whether a plan sponsor will benefit more, the same, or less from increasing qualified plan contributions under TCJA. To a large degree, the potential benefit of increasing qualified plan contributions is dependent upon the taxable income ultimately being reported on the individual's income tax return. Consequently, determining the extent these increased qualified plan contributions may create benefit can be difficult.

Broadly:

- Plan Sponsors whose owners report taxable income below the threshold levels described above will not see incremental benefits from increased qualified plan contributions, and will likely see a decrease in tax savings from the qualified plan contributions they are already making. For these sponsors, other reasons for funding a qualified plan will become more important, such as employee retention or accelerated retirement savings for business owners and executives.
- Plan Sponsors whose owners receive very high levels of QBI are unlikely to fund sufficient additional qualified plan contributions to reduce taxable income to a level that will create an incremental benefit. These sponsors will see little change in the tax savings of a qualified plan contribution.
- Plan Sponsors whose owners report taxable income moderately in excess of the threshold levels and generate QBI from an SSTB (or QBI that generated from an activity having an insufficient amount of W-2 wages and/or qualified property) may realize significant benefits from increased qualified plan contributions. This is because in addition to the normal reduction of taxable income, the deduction of the contribution may also trigger an increase in the allowable Section 199A deduction. If an advanced plan design is used, there are more sponsors who fall in this third group than one might initially think.

BDO INSIGHT: WHAT NEW SECTION 199A RULES MEAN FOR PLAN SPONSORS

As described above, certain owners of Plan Sponsors may see an additional benefit from increased qualified contributions. Let's look at two examples.

Example 1. Consider a single sole proprietor with Form 1040 taxable income of $208,000 and QBI of $208,000 (so no adjustments needed to determine QBI). This is above the $207,500 threshold limitation, so the Section 199A deduction may be limited (depending on whether the QBI is generated from an SSTB or has insufficient W-2 wages or qualified property associated with it)., For the sake of example, let's assume the Section 199A would be limited to zero. Now let's assume this sole proprietor makes a $50,500 qualified plan deduction. Now taxable income and QBI are reduced to $157,500. The Section 199A deduction is limited to the lesser of 20% of taxable income or 20% of QBI. Consequently, the Section 199A deduction would be 20% * $157,500, or $31,500. Net taxable income is now $126,000. Assuming a 24% marginal tax rate, the Section 199A tax savings is $31,500 x 24% = $7,560, and the regular tax savings is $50,500 x 24% = $12,120. Total tax savings from the $50,500 contribution is $19,680 for a 39% effective tax savings.

Example 2. Consider a married sole proprietor taxable income of $555,000 and QBI generated from an SSTB of $555,000. This is above the $415,000 limit, and QBI is generated from an SSTB, so the Section 199A deduction would be zero. Now assume this client makes total contributions of $240,000 to their qualified plans. This would bring their income and QBI down to $315,000 and allow a 199A deduction of $63,000. Net taxable income would now be $252,000. Assuming a 24% marginal tax rate, the Section 199A tax savings is $63,000 x 24% = $15,120, and the regular tax savings is $240,000 x 24% = $57,600. Total tax savings from the $240,000 contribution is $72,720 for a 30.3% effective tax savings.

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