ERISA ROUNDUP

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

Q3 2021

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

The leaves are changing and sweater weather is finally upon us, which can only mean one thing: FALL! With the shift in seasons, now is the perfect time to take stock of those retirement plan-related tasks that you may have been putting off during the plan audit and Form 5500 filing rush. We encourage you to take a breath and catch up with this quarter's ERISA Roundup for all our most current updates to help you game plan for your plan's year-end.

In recognition of October being Cybersecurity Awareness Month, we've compiled a special Spotlight on Human Resources and Cybersecurity section that incorporates our latest insights, podcast episodes, and regulatory updates on this important topic. Be sure to check out the calendar of key dates and deadlines to help you monitor compliance as 2021 comes to a close. We've also included articles on topics such as: reportable findings under SAS 136, legislative and regulatory actions driving current trends in retirement benefits, recent tax alerts of interest to plan sponsors and much more.

Lastly, don't forget to take a few minutes to listen in and catch up with us on our most recent **BDO Talks ERISA podcasts** (preferably with a cup of something warm!).

Sincerely,

BETH GARNER
National Practice Leader, EBP and ERISA Services

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

IN THIS ISSUE

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.

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.

SPOTLIGHT: HUMAN RESOURCES AND CYBERSECURITY

Human Resources business leaders have likely spent a few restless nights wondering when it will happen and how their team will respond. Data breaches at some of the world's most recognizable names in business are making headlines almost daily. Remote work is here to stay for many, making it that much harder to keep sensitive information from exposure.

Asking employees to change passwords regularly and requiring annual cybersecurity training only goes so far. Phishing scams are looking for creative ways to trick even the most discerning member of the workforce. So, how can we prepare?

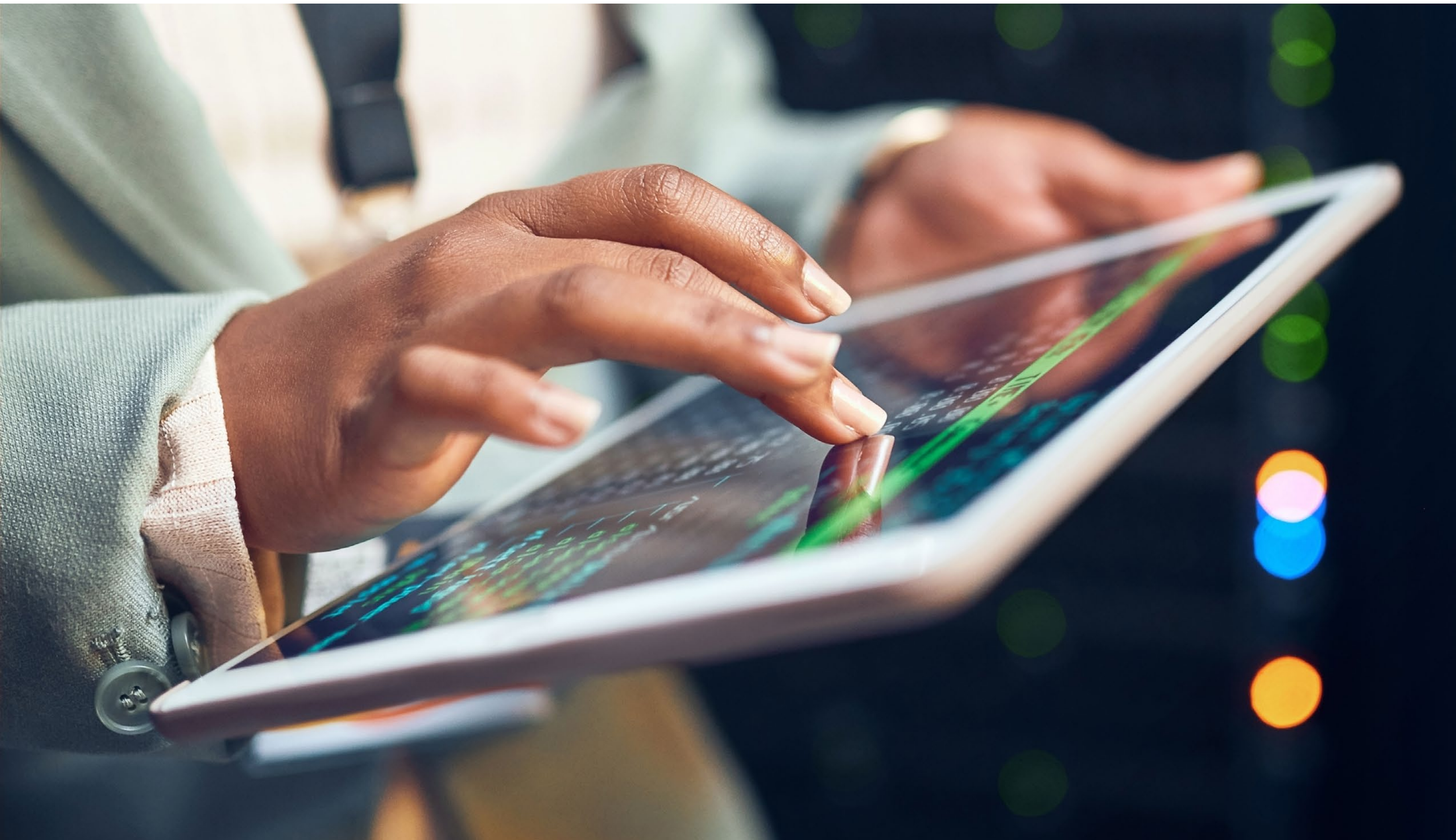
This Cybersecurity Awareness Month we've compiled a collection of resources to help you stay up to date with emerging regulations and keep data protected.

INSIGHTS

- Article: **Retirement Plan Sponsors: Is Cybersecurity Part of Your Fiduciary Duty?**
- Podcast: **Not a Matter of If, but When: Protecting Your Data and Your Responsibilities as a Plan Sponsor**
- Article: **Remote Working and Cybersecurity Considerations for Plan Sponsors**

REGULATORY UPDATES

- Podcast: **Unpacking the Department of Labor's Cybersecurity Guidance**
- Article: **DOL Issues Cybersecurity Guidance for Retirement Plans**
- Article: **Cybersecurity Consideration for the DOL's New Electronic Disclosures Rule**



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 9: SAS 136 Back with Attitude: Understanding Reportable Findings

Erin Briet joins our hosts to take a closer look at reportable findings under SAS 136. Erin shares some real-world examples of what reportable findings look like, how to properly communicate these to the client, and more. Be sure to listen to our earlier episode **Don't You 'SAS' Me! Gut Check on SAS 136** for a complete overview of this new auditing standard.

LISTEN TO EPISODE 9 NOW

Episode 10: The Core of the Cookie Cutter: Understanding Litigation Under ERISA

We welcome David Levine, Principal and Co-Chair of the Plan Sponsor Practice with Groom Law Group. On this episode David shares what is at the core of ERISA lawsuits, what pitfalls fiduciaries should avoid, and the trends he sees impacting ERISA litigation today.

LISTEN TO EPISODE 10 NOW

Episode 11: Unpacking the Department of Labor's Cybersecurity Guidance

David Levine returns to discuss the DOL's guidance on cybersecurity and how plan sponsors should prepare for the possible impacts the guidelines could have on enforcement audits in the future.

LISTEN TO EPISODE 11 NOW

Audit Communications to Plan Sponsors More Robust under SAS 136

The AICPA's Statement on Accounting Standards No. 136 (**SAS 136**) will meaningfully change the audit process for defined contribution plan sponsors – whether adopting this year or next. The AICPA issued SAS 136 in July 2019 with the goal of giving readers of the audit report a better understanding of the scope of the audit, as well as clarifying the responsibilities of the plan sponsor and auditor. SAS 136 requires a greater level of written communication to those charged with governance.

Plan sponsors should expect more communication from auditors throughout the audit process. Proactive planning can help to ensure there are no surprises at the end of the audit.

BACKGROUND ON SAS 136

The Department of Labor (DOL) has increased its focus on the quality of retirement plan audits over the past decade. In 2015, the DOL's Employee Benefits Security Administration (EBSA) **conducted a study** of 400 audits on plans subject to the 1974 Employee Retirement Income Security Act (ERISA). The study found that nearly four out of 10 audits contained major deficiencies, leading to rejected Form 5500s. The AICPA, working in consultation with the EBSA, issued SAS 136 to improve the consistency and transparency of audits as well as expand the level of communication between auditors and their clients.

In March, BDO published an **overview of SAS 136** and its general changes on procedures and documentation, including the introduction of the ERISA Section 103(a)(3)(C) audit in place of the "limited scope" audit. While the new rule is effective for audits covering periods ending on or after December 15, 2021, some auditors, including BDO, have already adopted SAS 136.

REQUIRED COMMUNICATION FOR REPORTABLE FINDINGS

One major change under SAS 136 is the requirement for auditors to communicate "reportable findings" to those charged with plan governance. SAS 136 takes concepts from three clarified auditing standards (AU-Cs) as the basis for determining a reportable finding. While some of these communications were previously handled verbally, all are now required to be provided in writing.

- **AU-C 250:** Non-compliance (or suspected non-compliance) with laws and / or regulations
- **AU-C 260:** Certain findings that the auditor believes are significant and relevant to those charged with governance
- **AU-C 265:** Deficiencies in internal controls found during the audit that the auditor finds merit management's attention

Under SAS 136's AU-C 250, non-compliance with laws and regulations is not a gray area and is always considered a reportable finding. For issues covered by AU-C 260 and AU-C 265, consideration of auditor's professional judgment in determining what is a reportable finding. This means that all audit findings and controls deficiencies are not necessarily a reportable finding, it is dependent on the facts and circumstances of the audit and plan.

HOW PLAN SPONSORS CAN PREPARE FOR AUDITS UNDER SAS 136

Plan sponsors should have discussions with their auditors to learn about the updated responsibilities under SAS 136. Before the audit commences, plan sponsors and their auditors should collaborate to define issues of importance (above the minimum auditing standard).

In addition, plan sponsors and their auditors should agree upon the extent of interaction during the audit process to discuss audit results and get real-time updates on findings. Doing this kind of planning before the process starts will alleviate surprises. Beyond the benefits to auditors, these planned meetings may aid plan sponsors in identifying common issues that need to be addressed.

BDO INSIGHT: Increase Your Engagement in the Audit Process

SAS 136 has many new requirements that are intended to increase the transparency of audit reports as well as the plan sponsors' involvement in the audit process. The goal is to yield a higher quality audit and ultimately a stronger, better-managed plan. But these positive outcomes won't occur unless plan sponsors and auditors communicate to ensure that everyone understands the objectives of the audit and roles and responsibilities of the auditor.

Your BDO representative can help you understand how SAS 136 will impact your audit process and prepare for these changes in the future.

How to Boost Tax Deductions by Retroactively Adopting a Workplace Retirement Plan

Employers who could use a federal income tax deduction for 2020 can consider retroactively adopting a broad-based, tax-qualified retirement plan, such as a discretionary profit-sharing plan, cash balance plan or traditional pension plan and making employer contributions before the extended due date of their 2020 income tax return. An employer could retroactively adopt a 401(k) or 403(b) plan and make a profit-sharing contribution (but no salary deferrals) for the prior year, since participants must make deferral elections before the amounts are earned.

For decades, employers generally could deduct plan contributions made by the extended due date of their federal tax return to fund such a plan for the prior year, so long as they adopted the plan before the end of that prior year. But the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 allows more time for adopting the plan. New Internal Revenue Code Section 401(b)(2) allows employers (including "owner-only" businesses) to adopt the plan within the same time period for making deductible contributions, retroactively effective to the prior tax year. Thus, employers now can adopt and contribute to a tax-qualified retirement plan for last year, all by the extended due date of its federal income tax return for last year in order to deduct the funding on the extended income tax return. The deadline for filing federal income tax returns for calendar year S corporations and partnerships is March 15 (or September 15 if extended) and for C corporations and sole proprietors it's April 15 (or October 15, if extended).

This change in the law reverses the IRS's position (going back to the 1970s) that employers had to adopt the plan before the end of the tax year, even though they had until the extended due date of their tax return for that year to fund contributions that they wanted to deduct on the extended return. In the "old days," employers either rushed to adopt retirement plans by year end or, at tax time, grudgingly realized that they had missed an opportunity by not adopting the plan by year end.

Since 2020 was such a tumultuous year, some employers who planned to adopt a retirement plan might still be operating under the old rules and may have missed this big favorable change in the rules. Moreover, when looking back at their 2020 tax year, some employers may find that 2020 was an unexpectedly good year financially, due to generous federal and state stimulus and other relief. For example, many employers benefited from the CARES Act--including the Paycheck Protection Program (PPP), the employee retention credit (ERC), and delayed payroll tax deposits — as well as from the Families First Coronavirus Relief Act (FFCRA) paid sick and child care leave, the Small Business Administration (SBA)'s expanded Economic Injury Disaster Loan (EIDL) program, the Federal Reserve's Main Street Lending Facility, the Restaurant Relief Fund, the Shuttered Venues program, etc. Some of that relief is still retroactively available for 2020 for employers who are eligible to claim it in 2021.

The SECURE Act change in the law applies to all tax years starting on or after January 1, 2020, so it is a strategic tax planning technique that is not linked to COVID disaster relief and remains available for future years' tax planning.

BDO INSIGHTS

Form 5500. Employers need to keep in mind that the retroactive adoption of a qualified retirement plan generally creates an annual Form 5500 filing requirement for a plan year that has already closed. Since the adoption of the plan can now occur after the original due date of the Form 5500, employers who intend to retroactively adopt a new plan may want to consider filing for an automatic 2½ month extension on Form 5558, especially if the sponsor has a fiscal tax year. The regular due date for filing Form 5500 is the last day of the seventh month after the end of the plan year (i.e., July 31 for a calendar year plan).

Alternatively, an automatic 2½ month extension applies if the employer files the Form 5500 by the extended due date of the employer's federal income tax return (but only if the plan year and corporate tax year are the same and the employer obtained an extension of its corporate income tax filing). For example, a calendar year C corporation that extended its federal 2020 Form 1120 to October 15, 2021, could adopt a new profit sharing or pension plan retroactive to any date in 2020, so long as the plan year ended on December 31, 2020, and both the Form 1120 and Form 5500 would be due on October 15, 2020, along with the contribution to the plan, which would be claimed as a deduction on the 2020 Form 1120.

Audit Reports; Short Plan Year. Keep in mind that new plans that have 100 or more participants as of the first day of the plan year generally must include an independent qualified auditor's report with Form 5500. Such audit reports often take months to prepare, even for new plans. But a special rule allows the initial audit report to be deferred to the next year, if the plan had a short plan year of seven months or less. Therefore, employers who would otherwise need an audit report may want to consider retroactively adopting the new retirement plan with a short initial plan year of seven months or less (for example, the plan's effective day could be July 1, 2020 instead of January 1, 2020).

Funding Limits. The regular IRC Section 404 and 430 funding limits still apply to retroactively adopted plans. For example, the maximum deduction for a 2020 profit sharing plan is generally $57,000 per participant. And calendar year defined benefit plans must complete the funding of the prior year's contribution by Sept. 15 (i.e., 8½ months after the end of the plan year, to avoid an excise tax under IRC Section 4971 for failing to satisfy the minimum funding rules), even though the extended due date of the federal income tax return is not until Oct. 15. Also, the plan must have an Employer Identification Number (EIN) for its trust and related bank account, which must be created in time to receive the contribution by the applicable deadline.

Signed Plan Documents. Employers should keep in mind that the IRS has instructed its field agents to insist on obtaining manual signatures on plan documents. Unsigned (and undated) documents are likely to raise concern over whether the plan was timely "adopted."

Tax Credits. As an added bonus, small employers may also be eligible to recoup the expenses related to creating the new workplace retirement plan, through "start-up" tax credits for up to three years.

SIMPLE Plans. Adopting a new plan retroactively would void an existing SIMPLE plan at any time during the prior year (i.e., during 2020), because an employer who has a SIMPLE plan is not allowed to have any other plan.

The ability to adopt a broad-based, tax-qualified, workplace retirement plan after the close of the tax year and still get a deduction for last year based on contributions made to that plan by the extended due date of the employer's federal income tax return presents a new planning opportunity for 2020 (and beyond) that may generate immediate tax savings. This new tool can be helpful to employers who may not have been able to focus on year-end tax planning and are surprised by their tax bill.

In sum, employers who filed an extension for their 2020 tax return may want to consider if retroactively adopting a tax qualified retirement plan may help offset their 2020 tax liability. Employers who did not file an extension of their 2020 federal income tax return may not be able to retroactively adopt a plan for the prior year, but they could keep this planning technique in mind for future years. As with all tax planning strategies, employers should consider the impact of changing tax rates on the value of tax deductions for retirement plan contributions in the prior, current or future years.

Plan Sponsor Alert: 401(k) Plan Restatements Required by July 2022

Every six years, the Internal Revenue Service (IRS) requires employers with qualified, pre-approved plans to restate their plan documents – reflecting changes that have occurred since the plan documents were created or last restated. For defined contribution plans, the current restatement cycle – called Cycle 3 – opened on Aug. 1, 2020 and will close on July 31, 2022, meaning all plan documents need to be not only restated by then, but also certified by the IRS, and adopted by employers. Missing this deadline will force plans out of compliance and may result in IRS penalties.

The restatement process involves plan sponsors working with document providers such as third-party administrators and ERISA attorneys to re-write plan documents to include changes from all mandatory and voluntary amendments.

Cycle 3 reflects all legislative and regulatory changes passed before Feb. 1, 2017. Changes that were a result of the 2019 hardship distribution regulations, the 2019 Setting Every Community Up for Retirement Enhancement (SECURE) Act, and the 2020 Coronavirus Aid, Relief and Economic Security (CARES) Act are not part of the restatement but need to be addressed in separate, good faith amendments often called "snap on" amendments.

Plan sponsors may be wondering why restatements are necessary when their plans have been recently amended to reflect these recent changes. Those revisions are good faith, interim amendments; after a six-year cycle, the IRS requires that all pre-approved plans be restated to comprehensively address changes made by interim amendments.

BEST PRACTICES FOR A COMPREHENSIVE RESTATEMENT PROCESS

Beyond compliance, a plan restatement cycle presents the opportunity to assess whether the plan is working in a way that meets the overall goals of a company's benefits program and that the plan document is consistent with how the plan is being operated. In addition to navigating changes related to laws and regulations, organizations are constantly evolving and experiencing change to their operations, finances, and workforces—and over a six-year period, these changes can be significant. Specifically, changes caused by acquisitions, divestitures, new hires, recruiting strategies, and other events could necessitate amendments to the plan documents. Plan sponsors should be prepared to review the required materials with legal counsel, committee members responsible for plan amendments, and others to ensure that the new plan documents are compliant.

It is possible to include other discretionary amendments—often at no additional cost depending on the service provider—when completing a plan restatement. These may include:

- Adding a safe harbor 401(k) feature to automatically pass non-discrimination testing
- Changing eligibility requirements
- Adding automatic enrollment or escalation
- Introducing a Roth deferral or in-plan Roth rollover option

BDO INSIGHT: Get in Touch with Your Document Provider Early

If you use a pre-approved plan and haven't heard from your third-party administrator, attorney, or other document provider, reach out to them as soon as possible to begin the plan restatement process. Safe harbor plans that require end-of-year participant notifications may want to complete the process even earlier so participant communications include required language from the updated documents.

In general, document providers will base the plan restatement on existing plan terms unless a plan sponsor has requested specific changes. Plan sponsors should have a firm sense of the plan's processes and procedures because any discrepancy between the restated plan documents and actual operations may result in costly errors or even plan disqualification. An unchecked box in the adoption agreement, a change in the plan's definition of compensation, or changes to eligibility requirements can become highly problematic. The IRS does have a corrections program, but pre-planning will go a long way in avoiding this step.

Use this as an opportunity to analyze your plan and ensure it is set up in the best way possible to serve your company's goals.

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2020 Form 5500 Not Needed for Retroactively Adopted Retirement Plans

On August 6, 2021, the **IRS announced** that employers who in 2021 retroactively adopt a tax-qualified retirement plan for 2020 are not required to file a 2020 Form 5500 Annual Return/Report for that plan. Instead, employers will need to check a new box on their 2021 Form 5500 indicating that the plan was adopted retroactively for 2020. If the plan is a defined benefit plan (including a cash balance plan), the employer must attach a 2020 and 2021 Schedule SB to the 2021 Form 5500.

The 2021 Form 5500 will be the initial Form 5500 for the 2020 plan and is due by the end of the seventh month following the 2021 plan year-end.

Since a 2020 Form 5500 is not required for retroactively adopted plans, an independent qualified auditor's report is also not required for the 2020 plan year (the report generally would be required for plans with 100 or more participants as of the first day of the 2020 plan year). Presumably, the initial audit report should be filed with the 2021 Form 5500 and should cover both the 2020 and 2021 plan years, but the IRS has not yet addressed this issue.

The relief applies to Form 5500, as well as Form 5500-SF (short form) and 5500-EZ (for one participant plans).

BACKGROUND

For decades, employers generally could deduct plan contributions made by the extended due date of their federal income tax return to fund a plan for the prior year, as long as the plan was adopted before the end of the prior year. However, the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 allows employers additional time to adopt a plan for years beginning after December 31, 2019.

The SECURE Act established new Internal Revenue Code Section 401(b)(2) to allow employers (including “owner-only” businesses) to retroactively adopt a plan within the same time period for making deductible contributions. This change in the law is not related to COVID-19, so it applies for 2020 and thereafter. Thus, employers now can retroactively adopt and contribute to a tax-qualified retirement plan for the previous year by the extended due date of the previous year's federal income tax return, as well as deduct the contribution on the extended return. The deadline for filing federal income tax returns for calendar year S corporations and partnerships is March 15 (or September 15, if extended) and for C corporations and sole proprietors it is April 15 (or October 15, if extended).

Although employers began using the SECURE Act relief in significant numbers after the close of their 2020 taxable years, it was unclear whether and how those employers should satisfy their annual reporting requirements, including the completion of Form 5500 for the 2020 plan year.

The IRS says it anticipates that similar rules will apply to the 2022 adoption of a plan retroactive to 2021 under the SECURE Act relief. The instructions for the 2021 Form 5500 will further explain the filing requirements for plans adopted retroactively. Pension Relief Offered by the American Rescue Plan Act

Top 5 Workplace Compensation and Benefits Trends

Many employers are giving employees greater flexibility to work alternative schedules, including hybrid arrangements (i.e., some in-person and some remote work) or continuing to work entirely remotely. To meet the moment and help with retention and recruiting, employers are reexamining their employee benefits, focusing on employees' immediate needs other than cash compensation.

Based on inquiries from BDO clients, we have identified the following as the top five current workplace compensation and benefits trends.

1. UNLIMITED PAID TIME OFF (PTO).

Chief financial officers might embrace the concept of unlimited PTO, because it eliminates accruals of earned but unused PTO, carryovers and cash-outs upon termination. Getting rid of that liability can boost the employer's financials and make payroll easier and more consistent. However, management may be concerned that some employees would abuse an unlimited PTO policy, while others would not take enough days off to avoid burnout, so those issues must be addressed.

For employees, unlimited PTO has pros and cons. On the one hand, it could improve morale by giving employees the ability to address their individual work-life balance and demonstrate the employer's commitment to overall employee wellness. With unlimited PTO, employees would have no incentive to go to work when they are sick, which can help avoid spreading COVID and other contagious diseases among the work force. Some employees may value a job that provides greater flexibility over more pay. Offering a unique benefit may attract or retain top talent in a competitive market. On the other hand, extra cash from PTO cash-outs would no longer be available.

Of course, having an unlimited PTO policy means that employers can no longer offer greater PTO as a reward (for example, as part of a promotion). Also, switching to an unlimited PTO program may be costly if accrued vacation must be paid out under state or local law. Some employers may simply freeze accrued PTO balances, to be used on a FIFO basis. Unlimited PTO also complicates compliance with certain federal and state mandates, such as the Family Medical Leave Act (FMLA) or minimum PTO rules.

2. EMPLOYER-PAID STUDENT LOAN DEBT AND EDUCATION.

Over the past few years, more employers have expressed an interest in helping employees repay their student loan debt as part of the employer's recruiting and retention efforts. Unfortunately, if an employer simply pays an employee's student loan debt, such payment is taxable wage income to the employee and is subject to income and employment tax withholding (and the employer would have to pay its share of employment taxes on those payments).

For 2020, the CARES Act allowed employers to repay up to $5,250 in employee student loan debt tax-free. The Consolidated Appropriations Act of 2020 (CAA) extended that relief through December 31, 2025. To make tax-free student loan payments to employees, employers would need a written plan that complies with Internal Revenue Code (IRC) Section 127 tuition assistance rules. Section 127 plans can provide tax-free payments for current education as well as student loan debt. Courses do not need to be job related. Eligibility for such plans is generally broad-based, provided the employee meets the stated criteria, which cannot discriminate in favor of highly compensated employees or owners.

Employers can also offer employees tax-free, job-related education as a working condition fringe benefit under IRC Section 132. Working condition fringe benefits can be provided on a case-by-case basis and need not be a broad-based program available to all employees.

Some employers want to provide tax-free scholarships to employees (or their family members), but employer-paid scholarships are generally taxable income to the employee (even if the employer pays the school directly). The IRS's rules for employers providing employees (or their family members) with tax-free scholarships are very narrow.

3. REIMBURSING WORK-FROM-HOME EXPENSES.

For employers' reimbursements of business expenses incurred by employees who are working remotely to be tax-free, the reimbursements must be made under what the IRS calls an "accountable plan." An accountable plan requires that the employer must have a written plan or policy to reimburse expenses that have a business connection, so long as employees submit an expense report within a reasonable period of time (i.e., 60 days). Generally, receipts are required for business expenses unless the amounts are under $75 (or are for lodging). Accountable plans are not only used for business travel, meals, lodging and transportation, but also can be used for any other business costs, such as work-from-home expenses.

When COVID converted many employees into remote workers, numerous employers began reimbursing employees for their business use of home internet and personal cell phones. Although IRS Notice 2011-72 generally makes employer-provided cell phones a tax-free fringe benefit, reimbursement for business use of a personal cell phone (and internet) remains subject to the IRS's accountable plan rules. In short, despite many employees' quick pivot to a mandatory remote work environment, the IRS has not published any tax reporting or income inclusion relief for employer-paid business use of personal internet or cell phone. Therefore, employees must submit an expense report within a reasonable period of time after incurring the expense to obtain a tax-free reimbursement from their employer for the business use of their personal internet or cell phone.

Employers who simply "reimburse" employees a flat amount periodically for business use of their personal internet or cell phone outside of the accountable plan rules generally must treat such amounts as taxable wage income.

Separate from the accountable plan rules, IRC Section 139 allows employers to make tax-free, tax-deductible "qualified disaster relief payments" to employees who incurred expenses that "but for" COVID (or another federally declared disaster, such as fires, floods, hurricanes, etc.), they would not have incurred. COVID was declared a federal disaster on March 13, 2020 and at some point, the federal disaster declaration will be lifted. Until that time, IRC Section 139 offers broad relief.

4. STATE AND LOCAL TAXES AND WITHHOLDING ON REMOTE WORK.

Remote employees who work in a state or local jurisdiction that is not the same as their regular work location can trigger state and local taxes for the employer. This is known as the employer having a "nexus" with that state or local area based on the employee's work presence. Although some taxing authorities announced special COVID relief from their general nexus rules, some did not (and some have lifted the relief). For example, in addition to withholding and paying state and local income and employment taxes, state and local sales tax, property tax, "doing business" tax and other taxes may apply to the employer, even if the employer was unaware that an employee was working in that jurisdiction.

Employers need to have systems in place to know where all of their employees are working at all times. Some employers give employees flexibility on where they can work, but list states or local areas that are off limits.

5. BACK-UP CHILD CARE.

As the number of COVID-vaccinated individuals increases, many of those vaccinated individuals feel more confident about returning to regular life, including work, child care and school. But since children under age 12 cannot yet get a COVID vaccine and as the highly contagious Delta variant continues to spread even to vaccinated individuals, employees may find that their regular child care provider has sent their child home because of a low-grade fever or coughing or sneezing more than once, or that the employee or their children must self-quarantine due to COVID exposure. To address the sudden, unexpected need for child care, some employers are providing emergency, "back-up" child care, either in employees' homes or in child care centers.

If an employer pays for a specified number of hours of child care from a provider on a contingency use basis (that is, the employer pays for the care regardless of whether it is used or not) and the employee uses the available back-up child care, the employee generally has imputed taxable wage income equal to the fair market value of the child care provided (regardless of any discount the employer may have received when it purchased the block of child care hours), minus any co-pay the employee may have paid. Employers are generally required to report the imputed income on the employee's Form W-2 and to withhold income and employment taxes from other earned pay.

For back-up child care to be tax-free to the employee, the employer needs to have a dependent care assistance plan that complies with IRC Section 129. Employers generally can provide, at the employer's expense (and exclude from employees' taxable income) up to $5,000 of child care as long as the employer satisfies Section 129's nondiscrimination and usage rules.

If employers want employees to pay for the back-up child care, employees can do so on a tax-free basis if the employer makes the IRC Section 129 plan available under an IRC Section 125 cafeteria ("flexible benefits") plan. In that case, the employee must have made a timely election under the cafeteria plan to set aside a designated amount of their salary to be used to pay dependent care expenses pre-tax.

Annual caps apply to how much can be set aside tax-free under IRC Section 129 plans (the cap is generally $5,000 per year, but for 2021 only, the cap is $10,500). Cafeteria plans have a "use it or lose it" rule, although certain carryovers are allowed as part of plan design. Even though the IRS has issued some COVID relief for IRC 129 and 125 plans for 2021 and 2022, it is not nearly as broad as what taxpayers had hoped.

Employers are likely to continue to face many other COVID-related issues. Federal, state and local authorities continue to issue rules intended to help them collect their fair share of taxes. At the same time, those agencies also continue to issue rules intended to help employers and employees rebound from the pandemic and avoid triggering further public health emergencies, often in the face of natural disasters. Tax rules generally lag in providing relief, and the rules frequently change. BDO can help employers navigate those choppy tax waters.

Secure Act Guidance for Safe Harbor Plans

Employers now have more flexibility in adding or amending safe harbor 401(k) or 403(b) plans, thanks to the 2019 Setting Every Community Up for Retirement Enhancement (SECURE) Act and subsequent guidance from the Internal Revenue Service (IRS). These changes should increase access to the benefits that safe harbor plans offer, such as avoiding administrative costs and burdens of performing certain nondiscrimination tests and strengthening retirement readiness thanks to meaningful employer contributions.

We outline the most significant changes that the SECURE Act made to safe harbor plans. We also explain why plan sponsors should talk with their advisors now about amendments that they may need to make to their plan documents to comply with these SECURE Act changes.

MID-YEAR AND RETROACTIVE ADOPTION OF SAFE HARBOR PLANS

Before the new law, plan sponsors had to adopt safe harbor plans before the beginning of the plan year. Now, plan sponsors can retroactively convert a traditional 401(k) plan to a safe harbor plan that uses employer nonelective contributions.

This option is particularly helpful for plan sponsors that realize mid-year that their traditional plan might not pass nondiscrimination testing for contributions on behalf of highly and non-highly compensated employees. As a reminder, plans that fail nondiscrimination testing generally return a portion of highly compensated employees' contributions to the employee, which are subject to income tax.

Plans now have until 31 days before the end of the current plan year to retroactively implement a safe harbor plan that makes employer nonelective contributions of at least 3% to all eligible employees. If plan sponsors miss this deadline, they can still retroactively implement a safe harbor plan until the last day of the following plan year, but at this point the minimum nonelective contribution increases to 4%.

ELIMINATION OF ANNUAL NOTICE REQUIREMENTS FOR NONELECTIVE SAFE HARBOR PLANS

Before the SECURE Act, plan sponsors needed to send participants annual notices outlining the safe harbor contributions. The IRS guidance clarified that plans that use nonelective contributions to satisfy the safe harbor requirement no longer need to send these annual notices. This change should help reduce administrative burdens for plan sponsors that use the nonelective contribution option. It is important to note, however, that safe harbor plans that use matching contributions must still send the annual notices.

INCREASED AUTO-ESCALATION CONTRIBUTION CAP

Plan sponsors that automatically enroll participants into a safe harbor plan that uses a qualified automatic contribution arrangement (QACA) must default the employee's contribution to at least 3% of the employee's pay with an annual increase of 1% to at least 6%. The automatic escalation of the employee's contribution previously was capped at a maximum of 10%, but the SECURE Act increased that limit to 15%. Plan sponsors can choose to stop the auto-escalation at an amount lower than 15%, however, as this increase is not a required change. This higher limit could be especially helpful in enhancing the retirement readiness of employees who tend to put their retirement savings on autopilot.

BDO INSIGHT:Start Conversations About Safe Harbor Plan Amendments Now

Plan sponsors that use safe harbor plans—or may consider adopting one retroactively—should start conversations with their third-party administrators and other relevant service providers about possible amendments to their plan documents. Many safe harbor amendments, related to SECURE, are due by the end of the first plan year starting in 2022.

Although plans have until the last day of the next plan year to retroactively implement a safe harbor plan using employer nonelective contributions, doing so at least 31 days before the end of the current year will save one percentage point per employee (3% vs. 4%). So now is the time to start doing the necessary calculations to see whether your plan is in danger of not passing nondiscrimination testing.

House Ways and Means Committee Releases Initial Tax Proposals

On September 13, 2021, the House Ways and Means Committee released draft legislation that proposes a series of tax increases and tax cuts, which will undergo a round of markups by the committee over the next few days. Most tax proposals were anticipated; however, the Committee provided a few surprises.

INCOME TAX PROVISIONS

Section 1202 – Qualified Small Business Stock

Taxpayers are currently eligible for 75% and 100% exclusions for sales of qualified small business stock (QSBS). In an unexpected move, the proposed legislation would eliminate the 75% and 100% exclusions for sales of QSBS acquired after February 17, 2009, and sold **after September 13, 2021**, unless the sale was made pursuant to a written binding contract already in place and not materially modified thereafter. The proposed provision would apply to taxpayers whose adjusted gross income equals or exceeds $400,000 and to trusts and estates.

Under the current 50% exclusion rules, the remaining 50% QSBS gain is taxed at 28%. The excluded QSBS gain is considered an alternative minimum tax (AMT) preference item, which, when considered along with the net investment income tax on the taxable half of the gain, results in an effective rate of 16.88% for QSBS acquired after February 17, 2009, and sold after September 13, 2021.

Capital Gains

The current maximum tax rate on capital gains is 20%. The proposed legislation would increase the capital gains rate to 25% for taxable years ending after September 13, 2021. Transitional rules are proposed for taxable years that include September 13, 2021, taxing net gains realized before September 13, 2021, at 20%. Gains arising from a transaction pursuant to a binding written contract in effect before September 13, 2021, (and not materially modified thereafter) would remain eligible for the 20% rate.

Planning opportunity: Consider deferring realization of some capital losses until 2022 to offset capital gains that would otherwise be taxed at 25%.

Top Marginal Individual Income Tax Rate

The top marginal individual income tax rate now is 37%. The draft legislation would raise the top marginal tax rate to 39.6% for taxable income over $450,000 for married individuals filing jointly and surviving spouses, $425,000 for head of households, $400,000 for single individuals, $225,000 for married individuals filing separately, and $12,500 for estates and trusts. The proposal would be effective for taxable years beginning after December 31, 2021.

Planning opportunity: Consider accelerating ordinary income to 2021.

Net Investment Income Tax

Under the current rules, net investment income does not include income derived in the ordinary course of a trade or business or income attributable to the disposition of property earned outside of a passive activity. The proposed legislation would eliminate those carveouts and others, while broadening the type of income subject to net investment income tax (NIIT). NIIT applies to the greater of “specified net income” or net investment income for high income individuals, estates, and trusts. “Specified net income” includes net investment income even if derived in the ordinary course of a trade or business and other gross income and net gains attributable to the disposition of property, even if earned outside of a passive activity or the trade or business of trading financial instruments or commodities. Certain foreign income is includible in the definition of net investment income.

The proposed provision would apply to taxpayers whose modified adjusted gross income exceeds $500,000 for married individuals filing jointly and surviving spouses, $250,000 for married individuals filing separately, $12,500 for estates and trusts, and $400,000 for all other tax filers. The proposal would be effective for taxable years beginning after December 31, 2021.

Carried Interests

The holding period to obtain long-term capital gains treatment for gain allocated to carried interest partners is three years. The proposal would extend the holding period from three to five years. The three-year holding period would remain in effect with respect to any income attributable to real property trades or businesses and for taxpayers (other than an estate or trust) with adjusted gross income of less than $400,000. The proposal also contains provisions to include all items that are treated as capital gain (for example, Section 1231 gain) and prevent avoidance of the holding period rules. The proposal would be effective for taxable years beginning after December 31, 2021.

Qualified Business Income

The qualified business income deduction currently is not limited by a maximum allowable deduction. The proposal would introduce such a cap, limiting the maximum allowable qualified business income deduction to $500,000 for married individuals filing jointly and surviving spouses, $250,000 for married individuals filing separately, $10,000 for estates and trusts, and $400,000 for all other taxpayers. The proposal would be effective for taxable years beginning after December 31, 2021.

Excess Business Loss Limitation

Under a temporary provision, excess business losses (EBLs) of non-corporate taxpayers in excess of $500,000 for joint filers ($250,000 for all other taxpayers) are disallowed and treated as net operating losses in the following year; however, the provision is set to expire on December 31, 2026. The proposal would make the temporary provision permanent and modify how a disallowed EBL is treated. Instead of treating the disallowed loss as a net operating loss in the following year, the EBL would be treated as a deduction attributable to a taxpayer's trades or businesses when computing the EBL in the subsequent year. The proposal would be effective for taxable years beginning after December 31, 2020.

Surcharge on High-Income Individuals

There is currently no surcharge imposed on high-income individuals. The proposal would impose a 3% surcharge on modified adjusted gross income in excess of $2,500,000 for married individuals filing separately, $100,000 for estates and trusts, and $5,000,000 for all other individuals. The proposal would be effective for taxable years beginning after December 31, 2021.

Transfers Between Deemed Owner and Irrevocable Grantor Trust

Transfers between a deemed owner and his or her irrevocable grantor trust are nontaxable events. The proposal would disregard grantor trust status when determining whether a transfer between a deemed owner and his or her grantor trust is a sale or an exchange, possibly resulting in a taxable event. Additionally, the proposal would expand the definition of related party under Internal Revenue Code (IRC) Section 267(b) to include grantor trusts and their deemed owners. The proposal would apply to trusts created on or after the date of the enactment of this provision and to any portion of a trust established before the date of enactment that is attributable to a contribution made on or after such date.

Planning opportunity: Consider sales to intentionally defective grantor trusts.

ESTATE AND GIFT TAX PROVISIONS

Estate Tax Basic Exclusion Amount

The estate tax basic exclusion amount is $11,700,000 for 2021. The proposal would terminate the temporary increase in the basic exclusion amount, returning that amount to $5,000,000, indexed for inflation. Under this proposal, the basic exclusion amount in 2022 is anticipated to be $6,030,000. The proposal would apply to estates of decedents dying and gifts made after December 31, 2021.

Planning opportunity: Consider making gifts up to the 2021 estate tax basic exclusion amount, $11,700,000.

Grantor Trusts

When a deemed owner of a grantor trust dies, the assets of that grantor trust (other than a fully revocable trust) are generally not included in the deemed owner's estate. The proposal would require that assets in a grantor trust be included in the gross estate of the deceased deemed owner. Additionally, the proposal would treat distributions (other than to the deemed owner or spouse) during the life of the deemed owner and the termination of grantor trust status during the life of the deemed owner as completed gifts.

The proposal would apply to trusts created on or after the date of the enactment of this provision and to any portion of a trust established before the date of enactment that is attributable to a contribution made on or after such date.

Planning opportunity: Consider terminating grantor trust status for irrevocable life insurance trusts (ILITs) or making gifts to an intentionally defective grantor trust, a grantor retained annuity trust (GRAT), or spousal lifetime access trust (SLAT).

Valuation Discounts

Valuation discounts, such as marketability discounts and minority interest discounts, are allowed for transfers of nonbusiness assets for estate and gift tax purposes. The proposal would eliminate valuation discounts for certain transfers of nonbusiness assets for estate and gift tax purposes. Nonbusiness assets are defined as passive assets that are held for the production or collection of income and are not used in the active conduct of a trade or business. The proposal would apply to transfers after the date of the enactment of this Act.

Planning opportunity: Consider making gifts that will be eligible for valuation discounts.

RETIREMENT PLANS

Annual Contributions to Plans

Annual contributions to retirement plans are not currently limited by the value of the retirement plans owned by a taxpayer. The proposal would prohibit annual contributions by "applicable taxpayers" to "applicable retirement plans" (which includes tax-qualified defined contribution plans, IRC Section 403(b) and 457(b) plans, and traditional and Roth IRAs) if the total value of all the taxpayer's applicable retirement accounts exceeds $10 million as of the end of the prior year. Applicable taxpayers are head of household filers with adjusted taxable income in excess of $425,000, married individuals filing joint and surviving spouses with adjusted taxable income in excess of $450,000, and all other taxpayers with adjusted taxable income in excess of $400,000. Both the $10 million cap and income limitations are indexed for inflation beginning after 2022. The proposal would be effective for taxable years beginning after December 31, 2021.

Minimum Required Distributions from Plans

Taxpayers are not currently required to take additional distributions if the total value of their retirement plan accounts exceeds $10 million. The proposal would require applicable taxpayers (as defined above) of any age to take a minimum required distribution equal to 50% of the aggregate vested balances in applicable retirement plans in excess of $10 million. In other words, if an applicable taxpayer's combined retirement plan account balances exceed $10 million at the end of the taxable year, the taxpayer must take a minimum required distribution in the following year equal to 50% of the amount in excess of $10 million.

Further, if the taxpayer's combined retirement plan account balances exceed $20 million, the taxpayer would be required to take distributions equal to the lesser of (i) the aggregate plan balances in excess of $20 million or (ii) the aggregate balances in Roth IRAs and designated Roth accounts in defined contribution plans. Once the taxpayer distributes the amount of any excess required under this distribution rule, the taxpayer then would be allowed to determine the retirement accounts from which to make distributions in satisfaction of the 50% distribution rule.

The proposal would be effective for tax years beginning after December 31, 2021.

Roth Rollovers and Conversions

The current definition of a qualified rollover or conversion does not exclude any portion of the rollover or contribution that is not includible in gross income. The proposed legislation would amend the definition of qualified rollovers and conversions to Roth IRAs to include only amounts that would be includible in gross income and subject to tax. The proposal would be effective for rollovers and conversions made after December 31, 2021.

"Back Door" Roth IRAs

"Back door" Roth IRA strategies currently allow taxpayers who exceed existing Roth income limits to make nondeductible contributions to a traditional IRA, and shortly thereafter, convert the nondeductible contribution from the traditional IRA to a Roth IRA. Current law also allows taxpayers to contribute to a Roth 401(k) plan regardless of income limits (including making non-Roth after-tax contributions) and convert such contributions to a Roth IRA. The proposal would prohibit applicable taxpayers from engaging in these "back door" Roth IRA strategies.

To eliminate these strategies, the proposal would prohibit Roth conversions, for both IRAs and employer-sponsored plans, for applicable taxpayers, as defined above. The proposal would be effective for distributions, transfers and contributions made in taxable years beginning after December 31, 2031 (10 years from now). However, for taxable years beginning after December 31, 2021, the proposal would prohibit all employee after-tax contributions in tax-qualified retirement plans and would prohibit after-tax IRA contributions from being converted to Roth IRAs regardless of income level.

IRAs and Accredited Investor

The proposed legislation would prohibit IRAs from holding any security that requires the IRA owner to be an accredited investor. This proposal would be effective for taxable years beginning after December 31, 2021, but with a two-year transition period for investments already held in an IRA as of the date of enactment.

IRAs and Self-Dealing

To prevent self-dealing, the proposal would expand the definition of "prohibited investments" in an IRA to include investments in which the IRA owner has a substantial interest. A substantial interest is defined as (a) a direct or indirect interest in investments not tradeable on an established securities market in which the IRA owner has at least 10% of the (i) combined voting power or value of all classes of stock, (ii) capital or profits interest of a partnership, or (iii) beneficial interest of a trust or estate; or (b) a corporation, partnership, or other unincorporated enterprise in which the IRA owner is an officer or director (or holds a similar position). The proposal makes this provision a requirement to be a valid IRA.

The proposal would be effective for investments made in taxable years beginning after December 31, 2021, but with a two-year transition period for investments already held in an IRA as of the date of enactment.

OTHER HIGHLIGHTS

The proposal also includes the following noteworthy provisions:

Repeal of the temporary limitation on personal casualty losses.

Expansion of the wash sale rules to include foreign currency, commodities, and digital assets. The rules also would apply to acquisitions by certain related parties including the taxpayer's spouse, dependents, taxpayers to whom the taxpayer is a dependent, entities controlled by the taxpayer or related party, 529 plans and Coverdell education savings accounts where a related party is the beneficiary, and certain 401(a), 403(a), 403(b), and 457(b) plans where the taxpayer or related party can make investment decisions.

COMMENT

The proposed legislation does not include a repeal of the $10,000 limit on the state and local tax deduction for individual taxpayers, nor does it include provisions to eliminate the step-up in basis upon death. It is unclear whether those provisions will be added to this proposed legislation or included in other legislation. Recent news reports suggest that these two provisions do not have solid support among Democratic leaders.

Tracking the Trends: Retirement Plan Benefits

Within the past couple of years, there has been a flurry of laws and regulations enacted to address the challenges workers face in saving sufficiently for retirement and provided short-term COVID-19 pandemic relief (financial and otherwise). Several legislative changes impacted retirement benefits offered by employers where the legislators were attempting to address key issues facing today's workers through the incorporation of new retirement plan provisions.

IMPROVING THE RETIREMENT SAVINGS RATE

The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 included several provisions intended to improve the retirement savings rate for workers. One change requires plan sponsors to provide each participant with two separate examples illustrating their account balance converted to a lifetime income product. The hypothetical examples are intended to help participants recognize whether they are on track to generate sufficient income to fund their retirement and to better understand how their savings translates into an estimated monthly dollar amount. The participant can then use this information to better plan their savings rates, if needed.

The SECURE Act also provided a safe harbor pathway for 401(k) plans to offer annuities (perhaps not coincidentally as some anticipate an increased demand for annuities or other products that provide lifetime income). A recently introduced bill—dubbed SECURE 2.0—would also ease restrictions on Qualified Longevity Annuity Contracts (QLACs), if passed.

When considering adding lifetime income benefit options, employers should assess whether this strategy is a good fit for the organization and its employees. Adequate investor education is crucial when incorporating these options to ensure participants are fully aware of the costs, benefits, and risks associated with annuities.

ENHANCING ACCESS TO RETIREMENT FUNDS WHILE ALSO PLUGGING THE "LEAKS"

While retirement plans allow for in-service withdrawals for serious financial hardships and participant loans for significant expenditures, many workers perceive retirement funds as their most viable option to cover routine expenses and budget shortfalls. Even prior to the COVID-19 pandemic, it was estimated that more than a third of Americans would be unable to manage a $400 emergency expense, **according to 2019 data** from the Federal Reserve.

With the pandemic spurring an increased need for loan and withdrawal assistance, the Coronavirus Aid, Relief, and Economic Security (CARES) Act (passed in March 2020) temporarily eased defined contribution loan, withdrawal, and repayment rules for participants affected by the pandemic. While most of the provisions were discretionary, a significant number of employers adopted them. A **November 2020 report** from the Plan Sponsor Council of America (PSCA) showed that about a third of employers offered increases in plan loan. About a quarter of plan sponsors noticed an uptick in loans since the onset of the pandemic, while more than a third saw an increase in withdrawals.

- Increased participant access to retirement funds is a concern for the long-term impact on retirement readiness. This so-called retirement fund "leakage" (which occurs through early withdrawals for hardship, participant loans taken but not repaid, and other cash-outs) represents a significant challenge to building workers' retirement preparedness. Some employers are incorporating special tactics and tools to discourage participants from using their retirement plan accounts as "rainy-day" funds, including:
- Greater restrictions and limits on participant loans (including limits on the number of loans and allowing loans only for serious financial hardships)
- Use of sidecar savings accounts, which are savings accounts linked to the participant's retirement plan account
- Offering an employee financial wellness program
- Encouraging use of alternative sources of funds or borrowings

ASSISTING WITH STUDENT LOAN DEBTS

Student loan debt is a crushing burden for many American workers: Americans carry a total of $1.7 trillion in student loan debt, according to **Federal Reserve data**. The CARES Act provided some temporary relief through suspension of repayments and interest accruals (through a zero percent interest rate) on federal loans through September 30, 2021. The Act's provision allowing employers to pay up to $5,250 toward an employee's student loans as a tax-free benefit was recently extended through 2025 by the Consolidated Appropriations Act (CAA). The proposed SECURE 2.0 legislation also includes a provision allowing employers to make matching contributions to employee 401(k) plans based on their student loan repayments.

These offerings may be attractive as an approach to attain and retain workforce talent, but be sure to realistically consider what portion of the employer's workforce would actually benefit from this assistance. Employers interested in helping employees manage their student loan debt should work with service providers to understand the various tools available and investigate any potential downsides of the benefit (which can be expensive).

For additional details and insights, please refer to our earlier article: **Employer-Sponsored Student Loan Debt Relief Extended Through 2025.**

BDO INSIGHT: Monitor Legislation and Trends while Preparing for Change

Changes and trends in retirement benefits are often driven by legislative or regulatory action. Since retirement plan solutions are often developed as a direct response to legislation, we encourage employers to monitor recent and ongoing legislation for temporary or optional provisions that could become permanent components of retirement benefits.

The axiom "change brings opportunity" is a notable reminder as employers face today's evolving workforce and workplace. Employers have an opportunity to use these legislative changes to redesign retirement benefit offerings to better meet employee needs as well as to further their goals and objectives. Your BDO representative is ready to help you understand the developing retirement benefit trends and strengthen your organization's offerings.

Potential Form 5500 Extensions for Disaster Situations

The Internal Revenue Service (IRS) provides tax relief provisions for taxpayers, who reside or have a business in an area, affected by a disaster situation. This includes areas impacted by severe weather such as wildfires, flooding and hurricanes. The length of the relief provisions varies by location. The tax relief provisions may include the Form 5500 due by October 15, 2021 for calendar year end (December 31, 2020) benefit plans.

Review the current tax relief in disaster situations **here**.

Best Practices for Monitoring Retirement Plan Service Providers

As a plan sponsor it is good practice to formalize a process around monitoring service providers. Establishing, documenting, and executing this process can help to ensure that each vendor is achieving the objectives set out at the beginning of the relationship. Monitoring service providers also helps plan sponsors proactively identify opportunities to improve the plan.

WHO MONITORS WHAT?

Typically, the individuals in charge of a plan's daily operations—such as the plan administrator or benefits department—are responsible for the day-to-day monitoring of service providers. The plan committee, on the other hand, provides higher-level oversight and reviews fees, service agreements, and other information.

Regardless of how monitoring responsibilities are split, the process should be documented, and those charged with monitoring must be aware of their specific roles and responsibilities. This can help to limit the likelihood of potential issues slipping through the cracks.

In addition to having a well-documented process, plan sponsors should record the findings and outcomes of their monitoring efforts. Fiduciaries should document whether service providers adhered to professional standards and legal and regulatory requirements, as well as whether vendor controls and procedures worked effectively and benefited the plan. Plan sponsors should also note whether there were any corrections, resolutions to issues, changes to fee arrangements, or any other changes to the relationship because of the monitoring process.

HELPFUL GUIDELINES FROM THE DOL AND AICPA

In its document, ***Meeting Your Fiduciary Responsibilities***, the Department of Labor (DOL) outlines several steps that plan sponsors should take to properly evaluate and monitor service providers. These include reviewing service providers' performance, analyzing their reports, and fact-checking their fees. In a previous article we discussed the DOL's recently **outlined range of practices** for combatting the growing threat of cybercrime to ERISA-covered retirement plans, including key focus areas when selecting and monitoring service providers.

The American Institute of Certified Public Accountants (AICPA) Employee Benefit Plan Audit Quality Center (EBPAQC) offers a **free plan advisory guide** to help plan sponsors effectively select and monitor outsourced plan recordkeepers and reporting functions. Several of the EBPAQC tips—such as checking on the timeliness and accuracy of specific recordkeeper functions—can be used to evaluate other service providers' performance as well.

HOW SOC REPORTS CAN HELP

Service Organization Control (SOC 1) reports can be a powerful tool to help plan sponsors get assurance that their service providers have proper controls in place and are working to benefit a plan and its participants. These reports offer an objective, third-party assessment of the operating effectiveness of an organization's controls. In fact, some plan sponsors require that their service providers and other vendors provide a recently completed SOC-1 report.

SOC reports can provide a host of valuable information about service providers. For example, qualified or significant exceptions in SOC reports could be a red flag that prompts plan sponsors to increase their review of a vendor's controls. Plan sponsors can also review complaint logs from participants, resolutions to issues, and unusual transactions to see whether service providers are operating effectively. To learn more, see our article, ***Why plan sponsors should read their service providers' SOC reports.***

Some service providers don't have SOC 1 reports, so plan sponsors may need to get creative when evaluating vendors. This may lead to more work and additional expense for the plan sponsor and auditor. The **AICPA's guide** offers several tips for these situations, including guidance on performing on-site visits.

BDO INSIGHT: Effective Monitoring is an Ongoing Duty

Managing a service provider isn't a "set it and forget it" relationship. Although a vendor may have passed initial inspection, it is good practice to continue monitoring vendors as part of a plan sponsor's fiduciary duty. Doing so helps you identify potential problems and adjust your lineup of service providers in real-time for the benefit of the plan and its participants.

Your BDO representative is able to walk you through the process of properly monitoring your service providers according to the needs of your plan.

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