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What Is An Annual Report (Form 5500)?

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Under the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), an employee benefit plan is required to make an "Annual Report." This report is filed using a Form5500 with various attached schedules of information. Although one report is filed, it goes both to the Internal Revenue Service (IRS) and the Department of Labor (DOL).

The filing obligation belongs to the Plan Administrator. By law, the Plan Administrator is the employer sponsoring the plan unless a specific entity or person has been named in the plan document. It is not the plan's third party administrator (TPA), although the TPA may prepare the Form 5500 for the Plan Administrator.

The Form 5500 requires information regarding the number of participants, financial information about the assets held in the plan, and the service providers involved with the plan. This information is reported on various schedules attached to the Form 5500. If the plan is a defined benefit plan, the Form 5500 requires that an actuarial report (Schedule B) signed by an enrolled actuary be attached.

In addition, if the plan covers 100 or more participants as of the beginning of the plan year, the plan is a "larger" plan and the Plan Administrator must attach an audited financial report on the plan assets.

Please note, the term participant for purposes of counting the 100 participant threshold includes active employees who are participants, as well as former employees who still have account balances or benefits in the plan. A participant in a 401(k) Plan will include an employee who could make 401(k) plan contributions but has chosen not to make one. This means a plan may have more participants then there are open accounts wherever the funds are invested.

There is a transitional rule which is called the 80/120 Rule, which permits a plan that originally had less than 100 participants but is growing, to delay needing an audit. If the plan originally had less than 100, but has increased over a 100 but is less than 121 participants, it may avoid the audit. For example, in 2008 the plan had 95 participants. In 2009, it had 101, and therefore, is not required to have an audit. In 2010 it has 125 participants; it will need to have an audit. If in 2011 the plan drops back to 100, it will still need an audit. The corollary to the rule is if the plan is over 100 but drops, the audited Form 5500 is still required to be filed until the participant count drops below 80. Form 5500s are due by the last day of the seventh month following the close of the plan year. For calendar year plan that date is July 31. A plan administrator can request an extension. In fact, there is an automatic extension of the due date to the employer's extended tax filing due date if:

- The plan year is the same as the employer's fiscal year
- The employer has been granted an extension for its tax return
- The extension is attached to the Form 5500

Failure to file a Form 5500 or filing late is punishable by fairly stiff penalties. Failure to include all the required information and/or the required audit can cause the Form 5500 to be treated as if it had not been filed.

For example, the IRS may charge $25 a day for each day the Form 5500 is late up to a maximum of $15,000. The DOL may charge a separate penalty of up to $1,100 a day. Since the DOL and the IRS wants to receive the information, the DOL has created the Delinquent Filer Voluntary Compliance Program (DFVCP), which permits a Plan Administrator to cure late filing of Form 5500s. There is still a penalty, but it is significantly less than if the program was not used. The penalty depends on the number of participants and how late the filing is made. The 80/120 Rule discussed above is used to determine whether the plan is a large or small plan for a particular year.

Small Plans (less than 100 participants)

- Penalty is $10 per day not to exceed $750
- If there are multiple late Form 5500s for the same plan, the maximum penalty is $750 for each plan year, not to exceed $1,500 per plan

Large Plans (100 or more participants)

- Penalty is $10 per day not to exceed $2,000
- If there are multiple late Form 5500s for the same plan, the maximum penalty is $2,000 for each plan year, not to exceed $4,000 per plan

For example, if a plan has 50 employees and has not filed its Form 5500 for 2006, 2007 and 2008, the penalty if all the Forms 5500 for the three late years are all filed at the same time is $1,500.

Conclusion

Filing Annual Reports is a critical task for the Plan Administrator. It is something that must be done until the plan is terminated and all funds are paid out. The penalties for failure to do so are significant. Plan Administrators are best advised to set up the internal personnel to prepare the form or engage outside professionals.