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Managing a health and welfare benefits program in today's regulatory environment has become an onerous task for plan sponsors. Not only are reporting requirements constantly evolving, but technologies are also enabling regulators to more closely monitor filings and impose potentially crippling penalties.

The Employee Retirement Income Security Act of 1974 (ERISA), a far-reaching law which covers most private-sector pension plans and health and welfare plans, imposes numerous requirements on plan sponsors. One such requirement is the filing of Form 5500, which was developed as part of ERISA's overall reporting framework to serve as an "annual report" and an important disclosure tool for the U.S. Department of Labor (DOL).

Over the past few years, the DOL has ramped up its enforcement efforts to make certain that plan sponsors are in compliance with the complex rules and regulations applicable to group health and welfare plans – and in many cases, DOL inquiries originate with a review of the plan's Form 5500.

When preparing Form 5500, mistakes are common and costly. Some plan sponsors incorrectly report certain required benefits, incorrectly code the benefits available under the plan, miscount plan participants, or misuse schedules. Shockingly, many plan sponsors do not even complete Form 5500 filings at all, whether due to a lack of understanding of ERISA reporting obligations or because of changes in management or organizational structure. However, these "innocent" mistakes could expose the plan to hefty civil and criminal consequences.

In the midst of increasing DOL scrutiny, many plan sponsors are outsourcing their annual filing obligations to Form 5500 vendors, which can apply their expertise to this critical report and provide training to plan administrators on the key requirements, rules and penalties.



ERISA and Form 5500 Filing Requirement Overview

ERISA was designed to set minimum standards for the plans governed by its rules, provide guidance for taxation of benefit plans and protect participants by requiring plan sponsors to give participants information about the plan.

Component Welfare Plans: Plan sponsors must submit an ERISA Form 5500 for any component benefit plan that is an ERISA welfare plan (e.g., health FSAs, dental, vision, long- and short-term disability, accidental death and dismemberment, business travel accident, and group term life plans, among others) unless an exemption applies (e.g., the welfare plan filing exemption for certain unfunded small plans with fewer than 100 participants at the beginning of the plan year).

Plans Subject to Filing: The following types of health and welfare plans must file an annual Form 5500:

- Large funded plans
- Large unfunded plans
- Large insured plans
- Large combination unfunded/insured plans
- Small funded plans
- Plans required to file Form M-1 (filing required of multiple employer welfare arrangements known as “MEWAs”)

Exemptions: The following types of health and welfare plans may be exempt from filing an annual Form 5500:

- Small unfunded plans
- Small insured plans
- Small combination unfunded/insured plans
- Plans for certain select employees (management or highly compensated employees)
- Employer-sponsored day care centers
- Certain apprenticeship and training plans
- Plans not subject to ERISA



Schedules Required: In addition to Form 5500 itself, several schedules may be required to be attached to the Form. Required schedules will vary according to plan size, funding type and benefit offerings, but may include:

- Schedule A (for insurance information)
- Schedule C (for service provider information)
- Schedule D (for direct filing entities/participating plan information)
- Schedule H (large plan financial information; generally applies to funded plans)
- Schedule G (financial transactions – part of Schedule H form)
- Schedule I (small plan financial information; generally applies to funded plans)

For example, assume an employer maintains a small premium payment plan to pay their health insurance premiums with pre-tax dollars. All 10 of the organization's employees participate in the cafeteria plan and the underlying health insurance plan which is "fully insured." Under this scenario, the employer does not need to file a Form 5500 for the cafeteria plan and no reporting is required for the health insurance plan, which is small, fully insured and exempt from the Form 5500 filing requirements. Now, if you assume the same facts, except increase the health insurance plan to 250, no Form 5500 is required for the cafeteria plan; however, the employer must file a Form 5500 plus a Schedule A for the insured health insurance plan to satisfy the ERISA reporting requirement.

Due Date of Filing: The Form 5500 Annual Return/Report and any accompanying schedules generally must be filed electronically by the last day of the seventh month following the end of the plan year. A plan sponsor may request an extension of up to 2.5 months by filing IRS Form 5558 by the plan's original due date.

SAR Requirement: Most plans subject to the Form 5500 requirement are also required to send plan participants a Summary Annual Report (SAR). The SAR discloses to participants pertinent information reported on the annual Form 5500. The SAR must meet certain content and distribution requirements and is generally due nine months after the end of the plan year.

DOL Inquiries on Welfare Plans are on the Rise

Required electronic filing has created a more sophisticated way for the DOL to identify plan sponsors that have failed to complete filings. By crosschecking their records using the plan administrator's employer identification number (EIN), the DOL can pinpoint plan sponsors that have appropriately filed Form 5500 for their retirement plans, but have not filed required health and welfare plans.

New obligations imposed under federal health care reform, which require employers to report employee count information, may also serve as a resource for the DOL to gather information about employer plan sponsors, including their size and benefit offerings. The Patient-Centered Outcomes Research Institute (PCORI) fee, Transitional Reinsurance Program (TRP), and the information reporting requirements under Internal Revenue Code section 6055 and 6056, all require plan sponsors/employers to report some level of employee count information. While these fees or taxes may not be enforced by the DOL, it is fair to expect that governmental agencies will share information they obtain for compliance related or other purposes.

Bottom line, now more than ever, new technologies and governmental activities are increasing the DOL's ability to identify incomplete, inaccurate, late and missed Form 5500 filings.

Penalties for Non-Compliance

Plan sponsors and administrators of health and welfare plans subject to ERISA who file late, incomplete or deficient annual reports can be subject to civil and criminal penalties. The DOL may assess a civil penalty of up to \$1,100 per day starting from the date of the administrator's failure or refusal to file the Form 5500. This penalty is cumulative, and there is no statute of limitation with respect to Form 5500 filing failures.

The DOL maintains a Late Filer Enforcement Program for Forms filed after their due date. Under this program, if identified by the DOL, the plan administrator may be assessed a penalty of only \$50 per day for each Form 5500 filed after the due date. The DOL also administers the Non-Filer Enforcement Program, which penalizes non-filers \$300 per day up to a max of \$30,000 per year for each plan year filing.

A plan administrator looking to remedy its failure to file Form 5500 may submit the filings under the DOL's amnesty program, the Delinquent Filer Voluntary Compliance (DFVC) Program. This allows a penalty of \$10 per day for each day the filing is late, up to \$2,000 per plan per year (or a maximum of \$4,000 per plan per filing submission). Note that the DFVC Program is only available to plan administrators who have not been identified by the DOL.

In addition to the civil penalties, criminal penalties are also possible. Under ERISA Section 501, any person who willfully violates any provision of Part 1 of Title I (which includes the Form 5500 reporting rules), or any regulation or order issued under such provision, may be subject to a fine of no more than \$100,000, imprisonment for no more than 10 years, or both. In the case of a violation by an entity that is not an individual (e.g., a corporation), the fine will not exceed \$500,000. "Willfully" requires only a finding of general intent – that is, the person acted knowingly and voluntarily. There is no requirement that the person acted with the specific intent to violate the law.

The Solution for Form 5500 Compliance

Given continued DOL scrutiny, the complexities associated with completing the Form 5500 accurately, and the penalties associated with missed filings, many plan sponsors and administrators have decided to outsource the entire process. By enlisting a Form 5500 preparation vendor, plan sponsors benefit from the guidance of seasoned industry experts.

Third-party support can include everything from reviewing completed forms for accuracy to completing all forms to training and advising on the Form 5500 filing process.

Quality Assurance Review. Reviewing Form 5500 filings for accuracy and completion is no small task, and small details can make a huge difference. Through a structured process, vendors review all Form 5500 and Schedules to ensure they reflect the plan sponsor's welfare plan, benefit offerings, and funding arrangements. The Form's content is also reviewed to verify the filing is completed within DOL instructions and guidelines.

Welfare Plan Form 5500 and SAR Preparation (Single and Multiple Plans). Many vendors offer a simple process for preparing electronic returns, facilitating the electronic signatures and submitting forms using approved software. Most filings also require a SAR, and the DOL provides specific content and delivery rules for these documents. Many vendors can prepare content-compliant SARs for Form 5500 filings that are ready for participant distribution.

5500 Filing Consolidation. Vendors can advise on strategy for consolidating multiple Form 5500 filings into a single plan and also prepare the appropriate documents for the transition – which in many cases decreases the administrative burden. Vendors will carefully review existing welfare plans and work with the plan sponsor to determine which plans should be eliminated, which should be merged, and which should become the surviving plan.

Assistance with DFVC Filings. Vendors can identify if plans have missed filings and can complete necessary documentation to bring plans to current filing status. Because the DFVC process is unique and less common, many practitioners strongly recommend plan sponsors utilize outside assistance with DFVC filings.

Amended Filings. It's common for plan sponsors to submit a Form 5500 with omissions or mistakes. Many vendors have the knowledge and expertise to assist filers with determining if and when amended filings are needed.

Form 5500 Training. Many vendors offer training assistance for completion of the Form 5500. Whether a sponsor is looking for a broad overview of the requirements or the nuanced, technical details, training seminars can be customized to meet an organization's specific needs. These sessions may focus on the Form 5500 Schedule content requirements, rules for Form completion, electronic filing requirements and submission processes, and SAR content requirement rules.

Other Form 5500 Related Services. Beyond the services detailed above, many vendors can also provide assistance and consulting with the following:

- DOL correspondence and notices related to welfare plan Form 5500 filings
- Form 5500 issues that arise with organizational restructuring including mergers, acquisitions, corporate spinoffs and other scenarios
- Recommendations for improving filing strategies
- Coordination of other ERISA plan materials (plan documents and SPD) with Form 5500 filings

For more information about health and welfare plan Form 5500 preparation and consulting services and other consulting resources available from Conner Strong & Buckelew, please contact us at 1-877-861-3220.