Practice Update

Retirement Plan Guidance and Compliance Trends in 2019

March 13, 2019

By Mary K. Samsa

2019 will be a busy compliance year for companies' human resource and finance leaders and other tasked with overseeing employer-sponsored qualified retirement plans. Compliance trends are coming into view, based on new IRS and Department of Labor (DOL) guidance and recent audit activity. Legal observations and opportunities on the following topics are described in detail below:

- An uptick in governmental reviews of retirement plans' annual reports
- A heightened focus on misclassified workers as non-plan-eligible independent contractors
- Increased audit activity in plans with large numbers of terminated participants who have a right to vested benefits
- New short-term flexibility with respect to offering retiree lump-sum cashout windows within defined benefit pension plans

IRS Review of Form 5500/Form 5500-SF Stop Filers

Although the requirement to file Form 5500/5500-SF (Annual Return/Report of Employee Benefit Plan) is articulated in the Employee Retirement Income Security Act of 1974 (ERISA), which is enforced by the DOL, the IRS is actually the governmental agency who monitors the applicable filings. The IRS has

Related People

Mary K. Samsa

Related Work

Employee Benefits and Executive Compensation

Tax

Related Offices

Chicago

indicated that during 2019 it will start to reach out to plan sponsors that have not filed one or more required Form 5500/5500-SF with respect to a given benefit plan. In many instances, these may be related to a merged or terminated plan for which the plan sponsor inadvertently omitted to make a "Final Return" filing on Form 5500. However, correction of submission of missing Form 5500s is rectified through use of the Delinquent Filer Voluntary Compliance Program (DFVCP) with the DOL. By using the DFVCP to make the required return submissions, the plan sponsor will be able to have late filing fees waived in most situations. Plan sponsors are encouraged to review their administrative procedures and confirm that all annual return filings for all employee benefit plans have been completed.

Updates to IRS and DOL Review of Misclassified Workers

The IRS and DOL remain focused on employers who misclassify their employees as independent contractors, because misclassification deprives Social Security, Medicare, unemployment insurance, and worker's compensation funds of billions of dollars and reduces federal, state and local tax revenues. Pursuant to a 2011 Memorandum of Understanding between the IRS and DOL on this topic, both organizations pledged to work together to curb worker misclassification through enhanced information sharing and collaboration. A February 20, 2018 follow-up report (Report) issued by the Treasury Inspector General for Tax Administration (TIG) noted that additional actions are necessary by the IRS to make the joint worker misclassification initiative with the DOL a success. The Report indicates that satisfaction of the 2011 objectives fell short. Consequently, the Report's key recommendation is for both organizations to develop a standardized referral form containing specific, actionable information either one can use to pursue worker misclassification violations. With a standardized approach in the types of information needed, IRS and DOL will be in a better position to determine the merit for further examination.

Given this renewed scrutiny, the issue of worker misclassification is included on the IRS' 2019 priority list. As such, for employers in sectors heavily utilizing independent contractors (e.g., medical and health, software development, project management, construction, and trucking, etc.), it is recommended that procedures used by the organization for confirming or determining independent contractor status be revisited and re-evaluated with a more critical eye to substantiating classification positions taken. With more pressure being put on the IRS for results in this area, documentation supporting such determinations will be even more critical.

DOL Continues to Audit Retirement Plans Due to Terminated Vested Participants

For the third year in a row, the DOL continues to issue broad audit requests to retirement plans with large terminated vested participant groups. As background, plan sponsors must identify each year on Line 6 of Form 5500 the number of participants who are no longer with the employer but have a right to vested benefits. This distinction is separate from the disclosure of those participants who are formally retired and receiving benefits. Unfortunately, for retirement plans with large numbers of terminated vested participants disclosed, this appears to be triggering an audit in certain circumstances.

As a general matter, the DOL is most interested in confirming that participants are actually receiving their benefits under any particular retirement plan. However, as employees leave employment and forget about existing benefits under a prior employer plan, the dollars left sitting on the table have become substantial. As such, during recent audits with the DOL, the agency is primarily interested in how actively the plan sponsor is trying to find missing participants and match them to their benefits. The question is how aggressively are plan sponsors pursuing this.

Plan sponsors typically rely on their third-party administrators (TPAs) to conducting missing participant searches. In many instances, the TPAs use the same participant search firm again and again which yields the same result each year...the participant cannot be found. Plan sponsors typically do not think to request that a different participant search firm be used to see if a different result can be achieved. In many instances, simply using a different search firm with a different approach will allow plan sponsors to actually locate a number of missing participants. Time and again, the DOL has entered a retirement plan audit and simply done Google searches and located missing participants. That becomes difficult to explain during the course of an audit, particularly for plan sponsors who claim they regularly look for participants.

Consequently, it is recommended that plan sponsors reengage with their TPAs on this issue and determine whether other participant locator services/agencies might yield a higher "find" or "located" percentage for the retirement plan. Putting in the effort now and reducing the number of terminated vested participants disclosed on any Form 5500 may actually save an employer the costly expense of an audit down the road.

IRS Notice 2019-18 – Offering Lump-sum Cashout Option to Retirees in Pay Status

In July of 2015, the IRS released Notice 2015-49 advising plan sponsors that if a lump-sum cashout window was pursued as a means of de-risking a defined benefit pension plan, and the lump sum option was offered to retirees who were already in-pay status, the ability of participants to accelerate their annuity distributions at any time would indicate that the initial benefits received by the participant were actually too small and therefore in conflict with the requirements of Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (Code).[1] In light of this (and to ensure Code Section 401(a)(9) was not violated), plan sponsors who offered lump-sum cashout windows after the release of Notice 2015-49 proceeded to only offer the option to terminated vested participants who had not yet commenced receiving their benefits.

On March 6, 2019, the IRS released Notice 2019-18 which states the IRS will not assert that a plan amendment providing for a retiree lump-sum window program causes the retirement plan to violate Code Section 401(a)(9). Notice 2019-18 supersedes Notice 2015-49 and plan sponsors can, for the time being, safely include their in-pay status retiree participant base in future lump-sum window programs. Notwithstanding this, Notice 2019-18 goes on to say that the IRS is continuing to study the issue of retiree lump-sum windows and may issue subsequent guidance in the future. Therefore, employers who wish to take advantage of this de-risking opportunity should immediately begin planning this with their legal and actuarial advisor.

*   *   *   *

With the lack of significant legal changes rolling out in 2019 with respect to the benefit plan area, the IRS and DOL initiatives appear to be focusing on areas which will allow them to generate revenue through penalty assessment. If you view any of the above areas as an exposure area for your organization, please reach out to your Akerman contact for purposes of evaluating your level of compliance.

[1] In general, Code Section 401(a)(9) requires that retirement benefits must commence no later than a participant's required beginning date and be paid over a period not extending beyond the life expectancy of the participant.