Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast: Just Compensation

Episode 12
The Form 5500: What All Employers and Plan Administrators Need to Know and How to Avoid Costly Fines

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Megan Monson: Welcome to the latest episode of Just Compensation. I'm one of your hosts, Megan Monson, Partner in Lowenstein Sandler's Employee Benefits & Executive Compensation practice group. And I'm joined today by two of my colleagues, Taryn and Batool, who I'll turn it over to, to introduce themselves.

Taryn Cannataro: Thanks Megan. I am Taryn Cannataro and I am an Associate in Lowenstein Employee Benefits & Executive Compensation group.

Batool Banker: Thanks everyone. My name is Batool Banker and I'm also an Associate in the firm's Executive Compensation group.

Megan Monson: Thank you both so much for joining today. We're going to discuss a topic that is important for all employers or plan administrators that maintain a tax qualified retirement plan, such as a 401(k) or defined benefit pension plan, or health and welfare plans. And that is, the correction of any sort of errors related to the Form 5500 filings. Throughout this podcast, we'll explain not only what a Form 5500 is, who is required to file these forms, when such forms need to be filed, and how to avoid costly fines if the Form 5500 is not timely or correctly filed. This is an issue that we see come up time and time again.

As with prior podcasts, this is intended to be a general overview of the topic, and you should review the rules and guidance based upon your applicable facts and circumstances, and discuss with counsel. Let's start off with the basics, what is the Form 5500?

Taryn Cannataro: The Form 5500 is an annual informational return filed with the DOL or Department of Labor. It's for certain tax qualified plans, such as 401(k) plans, pension plans, and certain health and welfare plans. The Form 5500 contains information such as the number of participants in the plan, the type of plan, information on the plan's service providers, such as investment advisors, and financial information about the plan's assets, liabilities and investment performance. The Form 5500 is part of ERISA's reporting and disclosure framework. It's intended to ensure that employee benefit plans are operated and managed in accordance with the prescribed standards and rules. The Form 5500 is an important tool, not only for the DOL, but also plan participants, plan beneficiaries, federal agencies, and the private sector, to assess employee benefit, tax and economic trends and policies.

Batool Banker: Right, and the Form 5500s are also important on a micro level. All the filings, once correctly filed, are publicly available so the proper filing of any Form 5500 ensures that participants and beneficiaries, as well as regulators, have access to the right information to protect the rights of participants and beneficiaries under the covered employee benefits plans.

Megan Monson: One of the things the 5500 discloses is whether or not a plan has a fidelity bond, which is something that's required for all tax qualified plans under ERISA, so it's important to look on the 5500 filing to see whether or not a plan does have this. Another area that's important to look at, is whether or not a Form 5500 has any late contributions listed. That's helpful if you're looking at it from a diligence standpoint, or just more generally, that's going to flag to the IRS and the Department of Labor that there have been late contributions made to your retirement plan. And if so, it's possible that you may experience an audit or questions about that, so you want to be ready to answer any inquiries related to how that was corrected.

Batool Banker: That's a great point, thanks Megan.

Megan Monson: In general, who needs to file the Form 5500, and when is it due?

Batool Banker: Sure. Let's start with who files the Form 5500. Generally it's administrators of certain tax qualified retirement plans that are covered by ERISA, for example, certain 401(k) plans and pension plans, 403(b) plans subject to ERISA, and certain health and welfare plans that cover more than 100 participants. These are all certain categories that must file the Form 5500 each year. And remember, each benefit plan will have a separate Form 5500 filing, for this reason it's important to coordinate with third party administrators as they usually handle these filings on your behalf, and then you should have the ability to review the forms before they're formally filed.

There's also certain types of employee benefit plans that are exempt from the Form 5500 filing requirements, such as a small, unfunded health and welfare plan with less than a 100 participants as of the beginning of the plan year, and an unfunded excess benefit plan. There's various versions of the Form 5500, so it's important to know this when you're filing and to know which one applies to you. For example, a small retirement plan with less than 100 participants as of the beginning of the plan year, may be eligible to file on the Form 5500-SF, while a one participant plan for business owners and their spouses, or a plan maintained outside of the US, may only need to file a Form 5500-EZ, both of which have limited disclosure requirements as compared to the general Form 5500.

Taryn Cannataro: Generally the Form 5500 and its accompanying schedules is filed with the DOL on or before the last day of the seventh month following the close of the plan year. So for calendar year plans, that means July 31st. However, there are certain entities [inaudible 00:06:10] direct filing entities that have nine and a half months following the end of the plan year, to file their Form 5500. As with many governmental filings, if this filing due date falls on a weekend or holiday, the due date is the following business day. There also is the ability to file an extension, which we'll address momentarily.

Megan Monson: For all the different Form 5500 filings that Batool mentioned, the instructions and the forms themselves are available on the Department of Labor's website, so it's really easy to go through and identify which would be applicable for your plan and for you to fill out the requisite forms. I'd also just note that filling out the forms in general is pretty simple, and think of it in terms of any other IRS or governmental filing that you have to do. Just have it in your checklist as something that you're going to have to do throughout the year if you maintain one of these type of plans we've mentioned. Similarly with other governmental filings, there's usually ability to get an extension.

Can you guys tell me about under what circumstances you can file an extension and how to go about doing that?

Taryn Cannataro: Form 5500 filers can request a one time extension before the filing deadline, so for a calendar year plan before July 31st, by filing a Form 5558. The Form 5558 is a very short, simple, one page form with very limited information that needs to be disclosed. It's typically just the name of the plan and identification number. And so long as the Form 5558 is filed on or before the Form 5500's regular due date, the extension's automatic, and does not require IRS or DOL approval. Although the Form 5500 must be filed electronically with the DOL, the Form 5558 is filed with the IRS. And a separate Form 5558 is filed for each Form 5500, for which an extension is desired. Once you file the form, a copy of the completed and filed Form 5558 should also be retained with the filer's records, but it's not required to be attached to the Form 5500 or furnished elsewhere unless the IRS or DOL requires proof that the extension was filed.

Megan Monson: Great, that sounds like a relatively straightforward, easy process if you need to go about getting an extension. You guys have done a great job of setting the stage in terms of, what is a 5500? Who's required to file, and when? So really want to get into the meat of, if you don't follow the proper rules and procedures and the 5500 is not filed correctly or at all, I understand that there are multiple potential penalties. Can you tell me a little bit about the potential penalties that may apply for not filing the form correctly and which entities assess those penalties?

Batool Banker: Sure, sure, Megan, and this is actually a major reason why filing the Form 5500 forms correctly and timely is very important. Firstly, many employers don't even realize there's been a missed filing or an incorrect filing on the Form 5500 series until they receive a letter from the IRS or the DOL. Or in many cases, if they're undergoing a sale process and the forms have been requested in diligence. However, late filed returns are subject to penalties from both the IRS and the DOL, so it's very important to identify the mistake as soon as possible.

Let's start with the IRS. The IRS penalty for late filings changed towards the end of 2019. For forms required to be filed after December 31st, 2019, including those related to the 2019 plan year, the penalty for failure to file is a whopping $250 a day, capped at $150,000 plus interest. For late filings prior to 2019, the fee was only $25 per day, capped at 15,000, but that's still much more than the fees would be under the voluntary compliance program, which we'll discuss later in this session. Additionally, for late form 8955-SSA filings, which are the attachments to Form 5500 filings for participants who have terminated employment, but are still owed deferred vested benefits, that penalty is only $10 per participant, per day, capped at 50,000, still a lot of money.

The DOL penalties are on top of those penalties. For late filings without a proper extension, through the DOL, there's a potential consequence of $50 per day for each plan. And this is per plan, per plan year that is filed late, and there's no cap on that penalty. For failure to file at all, the penalty is $300 per day, up to 30 grand per year until a completed annual return is filed. Additionally, the DOL has the authority to impose a $2,259 per day dollar penalty with no maximum. These are a lot of fines. It basically means that this can result in large fees with the IRS and the DOL, depending on how late the filing is. The Form 5500 is also filed under penalty of perjury, so an amended return should be filed, should you become aware of any errors on your Form 5500. As I mentioned earlier, there is the ability to pay reduced penalties under certain circumstances, which we'll get into shortly.

Megan Monson: I just wanted to note that the statute of limitations for filings that were due before or in 2019 are still open, so that's one of the reasons that we wanted to highlight the two different areas and penalties that apply. If a company misses the deadline to file their Form 5500, is there anything that could be done?

Taryn Cannataro: Yes. The DOL has a Delinquent Filer Voluntary Compliance Program, that's designed to encourage compliance with the annual reporting requirements. It's a voluntary program but the main benefit is that it gives plan administrators a way to pay reduced penalties and avoid the higher civil penalty assessments as Batool mentioned earlier. Plan administrators do this by satisfying the program's requirements.

Batool Banker: And the IRS will generally waive late filing penalties for Form 5500 filers who satisfy the DFVCP requirements, as long as they also file any missing Form 8955-SSAs, as we mentioned before.

Megan Monson: If a company wants to take advantage of the DFVCP, how and when can they participate in that program? Is that program available to all 5500 filers?

Batool Banker: Sure, sure. Let's start with your second question there. Eligibility in the DFVCP is actually limited to plan administrators with filing obligations under Title I of ERISA, who comply with the provisions of the program before they're notified in writing by the DOL that there's been a failure. For example, Form 5500-EZ filers and Form 5500 filers for plans without employees are not eligible to participate in the program, because such plans are not subject to Title I. Additionally, if the DOL has already notified an administrator of their failure to timely file Form 5500, it's now too late to participate in the DFVCP. However, an IRS late filer letter will not disqualify a plan from participating in the program.

Taryn Cannataro: Participation in the DFVCP is a two part process, so unsurprisingly, the first step is to complete the Form 5500 for the years for which relief is requested, and this includes all applicable attachments and schedules. The only difference here is that, unlike when filing a regular Form 5500, when filing a Form 5500 for the DFVCP, you should be sure to check the box labeled DFVC Program on the Form 5500. The next step is to submit to the DFVCP proof of the correction and other required documentation, and pay the applicable penalty amount. The plan administrator is personally liable for the penalty amount, so amounts paid under the DFVCP cannot be paid from assets of the employee benefit plan.

Megan Monson: Does that need to be filed online or can a paper application be submitted?

Taryn Cannataro: The DOL has a penalty calculator that helps calculate penalty and also allows you to make payments directly through the web-based system, so it's pretty simple to go on the DOL's website and do everything, directly online.

Megan Monson: Okay, great. I know that there was a mention of decreased penalty amounts if you're going through this program. If you can give some context to what those reduced penalties are, and is there any ability to get a waiver of all penalties?

Taryn Cannataro: DOL penalties under the DFVCP are reduced from $2,259 per day to $10 per day, for each day the filing is late, without regard to any extensions. Penalties for small plans, which as mentioned earlier are generally plans with less than 100 participants, are capped at $750 for a single late Form 5500, and $1,500 for multiple years. Penalties for large plans, which are generally plans that have more than 100 participants, are capped at 2,000 for a single late Form 5500, and 4,000 for multiple years, per plan. If, during any years of non-filing, there's a year where the plan is a large plan, for purposes of DFVCP the plan must use the large plan penalty amount of $10 per day, up to a maximum of 2,000 per filing.

Taryn Cannataro: While this seems confusing, as I mentioned earlier, the DOL penalty calculator makes this pretty easy. You just have to plug in your information into the calculator, and it'll tell you the reduced penalties that your plan will have by filing the DFVCP.

Batool Banker: And while there are these reduced penalties if you use the DFVCP, you cannot receive a waiver of all penalties, including if there's reasonable cause why a penalty should not be assessed. Payment of a penalty under the program constitutes a waiver of an administrator's right, both to receive a notice of assessment from the DOL and to contest the DOL's assessment of any future penalty amount.

Megan Monson: Just to add a couple of points, I know Taryn mentioned certain requirements that apply based upon the number of participants in the plan that you have, so that's based on the number of participants as of the beginning of the plan year, so that's how you can see what bucket you fall under. In general, there's a very helpful frequently asked questions on the Department of Labor's website that talks about this program in detail and goes through the reduced penalties, and when they apply. If you do find yourself in this situation, that's a helpful reference tool to have.

If you file under the DFVCP as a plan administrator, can you still be liable for other Department of Labor annual reporting penalties?

Batool Banker: Potentially, yes. Annual reports that are filed under the DFVCP are subject to the usual edit checks and other enforcement reviews that a correctly filed 5500 undergoes. However, there are certain opportunities to correct deficiencies that are outside the scope of this podcast.

Megan Monson: That's very helpful. So in short, if you have an issue with your Form 5500, make sure to correct it if it's late or you are aware of any incorrect information, ideally under this plan, so you pay the reduced penalties. But just be aware that that doesn't preclude you from being potentially subject to other enforcement actions, as I mentioned, if there's late contributions or things like that, that sparks an audit or other inquiries.

Batool Banker: Exactly, yeah.

Megan Monson: This has been a really helpful overview of the DFVCP program and all of the permutations of when that applies and the benefits of filing through that program. Do you have any other considerations or items to think about, either related to the 5500 filings in general or related to utilizing the DFVCP program?

Batool Banker: Well, overall the process of filing and then fixing Form 5500 errors is relatively straightforward, and almost all components of the process can be done electronically through the DOL website, as you mentioned. It's important though to coordinate with any third party administrators and legal counsel, to ensure this process is handled properly.

Taryn Cannataro: I would say the most important takeaway is to make sure that once you've identified that you have a missing or incorrect 5500, that you make any corrections timely and in advance of any notice from the DOL, this will help mitigate penalties and preserve the ability to correct through the DFVCP.

Megan Monson: Thank you so much for joining us today. We hope this episode provided some helpful guidance surrounding Form 5500 filings and the DFVCP program, should you find yourself needing to correct certain errors with respect to your tax qualified or health and welfare plans. Also thank you so much to Taryn and Batool for joining us today. We look forward to having you back for our next episode of Just Compensation.

Batool Banker: Thanks for having us, Megan.

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