

Governmental Guidance for Retirement Plans

What To Do If Your Form 5500 Is Late – Delinquent Filer Voluntary Correction Program

The Department of Labor (DOL) created a correction program in order to help plan sponsors avoid steep interest and penalties due to the late filing of Form 5500. With the advent of electronic filing of the Form 5500 (EFAST2) and the convenience of internet bill paying, there have been some recent changes to the correction program. Please note that this correction program is only available to plan sponsors who have NOT been notified by the DOL that their Form 5500 is late. However, those who receive a penalty notice from the IRS are still eligible to correct the late filing and avoid the penalty.

The first step is that the Form 5500, including schedules and attachments, is filed with the DOL using EFAST2, just like timely 5500s. This filing will be done using the forms for the current filing year, rather than for the year in which the failure occurred. However, the following schedules, if applicable, should be attached to the filing, using the correct-year forms: Schedule B, Schedule E, Schedule P, Schedule R and Schedule T.

In addition, the plan sponsor must send filing information to the DFVC program and make the required payment. There are two options for this filing: (1) the plan sponsor can send a check for the late filing penalty, or (2) the plan spon-

sor can use the DOL's e-payment tool.

If you want more information on correcting your late Form 5500 filing through the DFVC program, please contact your Nyhart consultant.

Participant Investment Advice – New Proposed Regulations

In February, the Department of Labor (DOL) issued new proposed



regulations about giving investment advice to plan participants. The regulations provide that fiduciary advisers may give investment recommendations

under an "eligible investment advice arrangement" without violating the DOL's prohibition against "self-dealing." While the regulations apply to fiduciary advisers primarily, some provisions do apply to plan sponsors. One important item for plan sponsors to note is that the selection of a fiduciary adviser is a fiduciary act.

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An eligible investment advice arrangement is defined in the regulations as one that uses a computer model or fee leveling for the investment advice. There are specific requirements that apply to each arrangement. In addition to these separate requirements, both arrangements must engage an independent auditor to annually determine whether the arrangement meets statutory requirements, and the fiduciary adviser must provide various disclosures. The regulations provide a model disclosure that may be used by the fiduciary adviser. Finally, the plan fiduciary must expressly authorize the investment advice arrangement.

Computer Model Arrangement

Under the DOL regulations, to use this type of arrangement, the computer model must be certified by an “eligible investment expert.” The certification indicates that the model meets ERISA and regulatory requirements. An eligible investment expert is defined in the regulations as any person, other than someone with a material affiliation or material contractual relationship with the fiduciary adviser, who “has the appropriate technical training or experience and proficiency to analyze, determine and certify” that the computer model meets the requirements in the regulations.



The regulations require that the computer model should be designed and operated to: (1) “apply generally accepted investment theories that take into account the historic risks and returns of different asset classes over defined periods of time”, (2) take into account management fees and expenses for the advice, (3) request, and if given, utilize individual participant information, (4) use appropriate objective criteria to provide asset allocations, (5) not inappropriately favor investment options that generate more income for the adviser or that are based on a factor that cannot be expected to continue in the future, and (6) take into account all investment op-

tions. However, the model can exclude certain investment options, such as employer stock, target date funds, annuity options, and brokerage windows and similar arrangements.

Fee-Leveling Arrangement

In order for a fee-leveling arrangement to qualify under the regulations, the investment advice must be given based on investment theories (as outlined in (1) above of the computer model arrangement). In giving the advice, the arrangement must take into account any management fees and expenses and must request, and if given, utilize individual participant information. Finally, the fiduciary adviser may not receive, directly or indirectly, any fee or other compensation which is based in whole or in part on the selection of an investment option.

Since these regulations are only in proposed form, any previous guidance will remain intact until this regulation is finalized.

Contact your Nyhart consultant for more information in the proposed investment advice regulations.

IRS Guidance on Military Leave Benefits

Since 1994 under the Uniformed Serviced Employment and Reemployment Rights Act (“USERRA”), an employee who leaves a job for “qualified military service” has had certain reemployment rights and pension and profit sharing benefits that would not have been received if the person had not taken military leave. The Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART”) adds additional benefits to veterans who qualify for the reemployment rights under USERRA.



Earlier this year, the IRS issued guidance on HEART Act provisions that affect retirement plans. Here are some highlights regarding the specifics of the Notice:

- The survivors of a participant who dies while performing qualified military service are entitled to any additional benefits the participant would have earned if not on military leave. This in-

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cludes accelerated vesting, ancillary life insurance benefits, and other survivor's benefits payable upon a participant's death.

- A plan is not required to credit benefit accruals for the period of qualified military service in determining death or disability benefits, although it is permitted to do so.
- Benefits that depend on employee contributions, such as matching contributions in a 401(k) plan, will be credited as if the individual had made contributions while on qualified military leave.
- Differential wage payments are not required to

be treated as compensation for determining contributions and benefits under a plan.

- A person is treated as having severed from employment during any period of active duty lasting more than 179 days and is permitted to receive a distribution of elective deferrals from the plan. The 10% tax penalty for early distribution will not be applied.
- Generally plans must be amended for the HEART Act by the last day of the first plan year beginning on or after January 1, 2010. Governmental plans by January 1, 2012.

Please contact your Nyhart consultant if you have further questions about the HEART Act and military leave.

News from the Courts

Deceased's 401(k) Benefits Go to Ex-Wife

A recognized important step in retirement planning often involves beneficiary designations. A federal court in Massachusetts upheld the participant's beneficiary election of his ex-wife even though their divorce decree waived her spousal rights under the plan. However, the participant did not change the designation naming his ex-wife as beneficiary.

In *Staelens v. Staelens*, the estate sued the deceased's ex-wife for the death benefit paid to her from the 401(k) plan. After 15 years of marriage, the participant and the ex-wife had divorced in 2004. Upon his death in 2008, the estate claimed the employer improperly paid the benefits to the ex-wife because she allegedly gave up her rights to the money when she signed a waiver as part of the divorce proceedings.

The estate did not claim the plan administrator was wrong in paying the benefits to the ex-wife, which was consistent with a prior U.S. Supreme Court case. However, a footnote in that case seemed to leave open the opportunity for the estate to sue the ex-

wife after the money was paid from the plan.

The Court outlined two issues in reaching the decision that the ex-wife should get the money. First, it found that the waiver was ineffective because the only way the ex-wife could legally surrender her rights to the benefits would be to file a QDRO (qualified domestic relations order) with the plan administrator. This did not happen.

Second, the Court reiterated that ERISA requires plan administrators to follow plan documents and applicable forms when distributing benefits. Mr. Staelens designated his then wife as beneficiary while they were married and did not change it after the divorce. Since the participant did not elect to change beneficiaries after the divorce, the Court ruled that the ex-wife receives the 401(k) funds, not the estate.

The significance of this ruling is twofold. First, plan administrators must follow plan documents when distributing benefits. Second, it is the participant's responsibility to notify administrators of their beneficiary selections and subsequent changes.



Defined Benefit Plan News

Restrictions Based on Plan's Funded Status

The Pension Protection Act became law in 2006 and added some restrictions for defined benefit plans with asset levels below certain funding targets. In one case, benefit accruals must cease or amendments increasing accrued benefits can't become effective until the funding level improves. In other cases, participants are not able to receive a benefit under an accelerated distribution option, e.g. lump sums, until the funding level improves.

The funding level used in these restrictions is called the adjusted funding target attainment percentage or "AFTAP." Your Nyhart actuary will determine the AFTAP for your plan each year.

You can always make a special contribution to the plan to prevent any of these restrictions from taking effect. If you want to consider this alternative, your Nyhart actuary can provide details about the amount you would need to contribute when the situation arises.

Benefit accrual limitation: If the plan's AFTAP is less than 80%, the plan can't be amended to increase accrued benefits or to increase the rate at which benefits accrue. If the AFTAP is less than 60%, all benefit accruals cease.

Distribution restrictions: If the AFTAP is less than 60%, the plan can't pay any benefits under an accelerated distribution option. In other words, the amount of distribution can't be bigger than the amount payable under a life annuity.

If the AFTAP is at least 60% but less than 80%, only half of the benefit can be paid in an accelerated option. In that case, the participant can (1) elect to

wait and receive the entire benefit in an accelerated option when the option is no longer restricted, (2) select another option and receive the benefit now, or (3) take half of the benefit in an accelerated option and the remainder payable in another option now.

Your Nyhart administrator will work with you to be sure the choices are understandable whenever distribution options are restricted.

Required Plan Restatements

The IRS requires all pension plans to be restated periodically to incorporate new legislation and regulations. The current round of restatements is referred to as the "EGTRRA restatement." Many plan sponsors use a type of plan that receives advance approval that the provisions comply with the law and regulations. This type of document is called a "preapproved" plan.

Although most of our plans previously used an individually designed document, most have opted to use a preapproved document for the EGTRRA restatement. (If you sponsor a cash balance plan, you cannot use a preapproved document.)

The IRS recently began issuing the approval letters for pre-approved EGTRRA defined benefit documents. Of course, the document providers for the preapproved documents must have the document system fully operational before restatements can begin, which will take a couple of months. We hope to begin these restatements this summer and the work will continue through next year.

If you have any questions about this process, please contact your Nyhart consultant.

National Health Reform

Impact of Health Reform on Health FSAs, HRAs and HSAs

The House has passed the Patient Protection and Affordable Care Act (PPACA) and on March 23rd the President signed the bill into law. The House also passed a Reconciliation Bill that made changes to the Senate bill. This bill was passed by the Senate, signed by the President and made two minor changes affecting Pell Grant provisions.

Title IX of PPACA contains several provisions intended to raise revenue to offset the cost of other parts of the law. Sections 9004 and 9005 affect HSAs, Health Reimbursement Arrangements (HRAs) and Health Flexible Spending Arrangements (Health FSAs) under cafeteria plans. Section 1403 of the Reconciliation Bill delayed the effective date of some of the Health FSA changes.

The following summarizes the changes made by PPACA and the Reconciliation Bill to Health FSAs, HRAs and HSAs:

- Effective for reimbursements for expenses incurred after December 31, 2010, the cost of over-the-counter medicines may not be reimbursed with excludible income through a Health FSA, HRA, HSA or Archer MSA unless the medicine is prescribed by a physician.
- Effective for taxable years beginning after December 31, 2012, the salary reduction contribution to a Health FSA cannot exceed \$2,500. The \$2,500 cap will be indexed for cost of living increases beginning in 2014.
- The tax penalty (i.e. tax in addition to ordinary income tax) for using funds in an HSA for expenses other than qualified medical expenses has increased from 10% to 20% effective for distributions made after December 31, 2010.

Contact your Nyhart consultant for more information on health reform.



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