



## I'm Late! I'm Late! For a Very Important Form 5500 Date!

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Let's start playing the Pension Geek Feud!! Top five answers on the board. Name a way that plan sponsors traditionally make mistakes and blow the Form 5500 deadline:

- Completely ignores communications from service vendor;
- Doesn't get started early enough on mandatory audit;
- Starts audit, but finds major problems and can't fix them timely;
- Has an owner-only plan and doesn't realize it needs a Form 5500;
- Change of personnel causes communication breakdown.

More likely than not, any service provider reading this Solution has come across at least one of the above reasons for why a client missed the Form 5500 filing deadline. The good news here is that, even when a Form 5500 is not filed timely, there is an easy way to fix the problem.

### **Making Sure That the Plan Sponsor Understands the Deadlines**

A Form 5500 is typically due seven months following the end of the plan year, without extension. That means that, for a calendar plan year, the due date would be July 31. Some plan sponsors, especially those that must have an audit performed, typically file a Form 5558 to obtain an extension of that filing deadline. There is no fee and no signature required to file a Form 5558, so if there is even a remote chance that the Form 5500 cannot be filed timely, it's always better to file for an extension. Once an extension is filed, the deadline is delayed for 2½ months. For a calendar plan year, that brings us to October 15. (Lesser known factoid: The Form 5500 filing deadline for plans with years that are the same as their sponsor's tax years are given an automatic extension if the sponsor's tax return is extended; that will mean a September 15 filing deadline for a calendar plan year.)

### **What Plans Need an Audit Report?**

The instructions for Form 5500 spell out the definition of a "large plan." A large plan is typically one that has more than 100 participants at the beginning of the year, reported on Line 5. However, beware of the "80-120" rule. This rule prevents a plan whose count hovers near 100 from falling in and out of the audit requirement on a year-by-year basis, which can be very expensive. The

80-120 rule provides that, if a plan sponsor was able to file in the previous year as a small employer, and the plan's current participant count is between 100 and 120, then the plan sponsor may still file as a small employer for that year. (Side tip: Having a procedure for routinely cashing out accounts for terminated employees that are less than the cash-out provision set in the plan may help keep the participant count below 100.) Conversely, a large plan whose participant count drops below 100 may elect to continue to treat itself as a large plan. But, if it drops below 80 participants, it must file as a small employer. (I have never come across an employer in my career that chose to pay for an audit if it didn't have to.)

Then, there is a lesser known trigger for a required audit. Per Labor Regulation section 2520.104-46, if a small plan does not have a proper bond, it must be audited annually. This is why it is highly recommended that all small plans pay for a sufficient bond, which costs a fraction of the cost of an audit. There are boxes that the preparer must check acknowledging that the plan qualifies for this audit exemption and that there is a bond in place. We have seen instances where the box is checked 'yes' for the exemption and 'no' for the bond. Not surprisingly, we see these during the IRS audit process.

### **So, How Do We Fix It?**

Let's start with the Form 5500-EZ for the owner-only plan. These plans do not fall under ERISA and, therefore, don't come under the U.S. Department of Labor ("DOL") jurisdiction. The Internal Revenue Service ("IRS") issued Revenue Procedure 2015-32 ("2015-32") to create a program to fix delinquent filings for owner-only plans. 2015-32 allows a plan sponsor to fix any, and all, delinquent filings to the IRS for \$500 per year, up to a maximum penalty of \$1,500. To prepare a filing under 2015-32, do the following:

- Type "Delinquent Return Submitted Under Rev. Proc. 2015-32, Eligible for Penalty Relief" at the top of the form.
- In Part I, Box D should be checked to indicate it is being filed under the delinquent correction program. (This is new for 2018, but so far 2015-32 hasn't been updated. So, still type the header note per the original instructions.)
- Submit the delinquent forms in date order, with the most recent year on top.
- On top of the most recent filing, include a completed Form 14708, with the payment attached to the Form per the instructions.
- Mail the package to the Ogden, UT address in 2015-32, using some trackable method for your records.

Now, if you are not correcting an owner-only plan, then you get to use the DOL Delinquent Filer Voluntary Compliance Program ("DFVCP"). A Q&A for the DFVCP can be found at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/dfvcp.pdf>.

Under this program, the plan sponsor would need to indicate in Part I, Section D of the Form 5500 that it is being submitted under the DFVC Program. Submission of the Form actually occurs through the normal submission process on eFAST. Once submitted, the plan sponsor will need to pay the penalty amount by completing the questions on the DOL website, <https://www.askebsa.dol.gov/dfvcepay/calculator>.

For a small plan, the penalty is \$750 per plan year filed late, up to \$1,500. For a large plan, the penalty is \$2,000 per plan year filed late, up to \$4,000. If this amount seems to be a lot, please remember that the daily penalty for a delinquent return is \$2,233 for the DOL and \$250 per day for the IRS. Late charges start to accrue from the original due date of the Form, and not the

extension date. This means that penalty charges would start from August 1 for a calendar plan, and NOT October 16.

Once the penalty is paid, the plan sponsor should print and retain a copy of its receipt for the payment.

### **What Is a Notice of Rejection and Why Should I Care?**

Oops! If a large plan sponsor should have filed an Audit Report with the Form 5500, but didn't, the DOL will send a Notice of Rejection ("NOR"), usually within a few weeks of submission. This notice informs the plan sponsor that the submission is delinquent, and that the DOL will issue penalties if it is not corrected timely. The plan sponsor has 30 days from the date of the letter to respond. **Do not miss this response date!** You can respond to the NOR, explain the circumstances of what is going on, and request an extension. Only during the NOR process can you request an extension and have a chance of avoiding a penalty.

If you don't respond to the NOR, the plan sponsor will then receive a Notice of Intent ("NOI"). The NOI is a penalty notice. There are no extensions permitted. The plan sponsor has 30 days from the date of the NOI to either pay the penalty or prove to the DOL that the submission has been correctly filed. If the Audit Report has been completed by this time, and the Form 5500 properly submitted, you can request an abatement or reduction of the penalty. The DOL will review the response in committee and determine the final penalty, if any.

Failure to respond to the NOI gets really ugly. The plan sponsor gets sent to collections at the U.S. Treasury. Interest starts accruing. Abatement is no longer possible. Avoid this at all costs.

### **Final Tips**

Communicate early. Communicate often. Communicate timely. Assuming that the person in charge of the Form 5500 at the plan sponsor's office knows what he or she is doing is a mistake. This may be "old hat" to you, but your clients are often unaware of how expensive noncompliance can be. It is up to the experts in the field to help clients navigate these deadlines and avoid unnecessary expenses. But, once a plan sponsor falls down the rabbit hole, don't let it get lost in Wonderland. Help your client out and remember that no one likes to be late for a very important date!



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