

Agency: Employee Benefit Security Administration, Labor  
Action: Proposed Rule  
Citation: 86 FR 51284  
Document Number: 2021-19713  
Docket Number: EBSA-2021-0006  
Regulatory Identifier Number: 1210-AB97

### **Proposed Implementation of Secure Act Revisions to Form 5500 Employee Benefit Plan Reports**

To Whom it May Concern:

We are writing to you to present our comments related to the proposed rule as named above. As benefit plan auditors, we are in an excellent position to share our perspective on the proposed changes to the headcount used to determine if an audit is required. We hope that this letter will provide insight into why we do not believe it is wise to change the audit thresholds. We are also using this opportunity to share our thoughts that may assist in meeting your goals of protecting public interests. As practitioners who are very involved in serving this practice area, we frequently interact with other practitioners at various conferences, employee benefit committee meetings, and continuing professional education classes. As auditors, we have come to believe that we have commonly shared values of primarily protecting the public's interests, individual participants, and their retirement assets. We also believe that we serve to assist plan sponsors in improving financial controls better to achieve regulatory compliance in a very complex environment. Additionally, we understand the need to be sensitive to the costs involved with appropriately maintaining a benefit plan, including the cost associated with the annual audit.

We present the following for your consideration.

Many of us have heard the Chief Accountant of the Department Of Labor (DOL) speak at various conferences and continuing education sessions over the years. The message that came through to us loud and clear from the time we were "green" audit staff was this: We are watchdogs, not lapdogs. That is a direct quote from Ian Dingwall, and has been the message driven home to us for quite some time. For many of us, this premise was an integral part of the foundation of our inspiration to work on benefit plans in the public accounting setting when there were so many other audit areas that were perhaps more beneficial to our careers.

In conversation, we often say that there are two worlds of benefit plans. However, our experience is that one set of controls may work for a large company's Plan may not be the same as what is crucial and relevant to the small plan environment.

#### Operational Issues

Smaller companies often set up benefit plans as an incentive to attract new employees and compete with larger companies. However, they may lack the ERISA compliance expertise, and typically, they have fewer employees in HR, and therefore, those employees are stretched thin in their roles. This increases the risk that a Plan will fail to achieve compliance objectives related to the salient aspects of the laws and regulations surrounding employee benefit plans.

### Operational Issues - continued

Operational and compliance risks have only heightened during the pandemic. As a result, we are finding more compliance issues in smaller plans than larger plans that have more experienced staff assigned to their administration, better segregation of duties, and receive a higher level of service from their recordkeepers.

There is a gap in service that is often missed or goes undetected within the payroll, human resource management systems (HRMS), and human resource information systems (HRIS) processes. The reason for this is twofold:

- (1) Plan sponsors rely heavily on their payroll providers for payroll programming. However, those programmers are typically not ERISA specialized. As a result, they could be using verbal or non-standardized operating policies and procedures versus the parameters of the plan document to program the system, and then programming errors may go undetected.
- (2) Recordkeepers are not fiduciaries. Their SOC 1 reports commonly outline user entity controls that they expect plan sponsors to have in place for the recordkeepers' controls to work correctly. Often those controls center around the plan sponsor being able to detect errors in their HRMS, HRIS, and payroll systems when submitting the data to the recordkeepers. Those recordkeepers may periodically catch errors when performing specific tests or making inquiries, but typically they have not been engaged to, and it is not their role to do so.

It is in the expectation gap mentioned above that a large percentage of auditor findings occur.

We thought it might be helpful to share real-life examples of the types of findings that we have encountered in plans with under 100 active participants. These findings were identified by having experienced, knowledgeable ERISA auditors performing risk-based audits, testing whether the Plan is being operated based upon the terms of the Plan Document. If it weren't for the independent audit, these types of errors would likely continue to go undetected in perpetuity or until the Plan is large enough to require an audit.

- (1) The SOC 1 report is not reviewed by management; the plan sponsor is unaware of the complementary user entity controls required to be in place for the recordkeeper controls to operate effectively.
- (2) Contributions were not reconciled between the payroll withholdings and the Plan in total.
  - a. The payroll provider was not remitting off-cycle contributions to the Plan.
  - b. The payroll clerk used an incorrect template and uploaded the proper total amount of contributions, but participant allocations were incorrect.
  - c. Contributions were not remitted timely.
  - d. Contributions for a pay date were duplicated or missed entirely.
  - e. Retirement withholdings on "bonus" or special payrolls calculated incorrectly.

### Operational Issues - continued

- (3) The Roth contribution formula was set up improperly in payroll, and all Roth contributions were miscalculated from plan inception forward.
- (4) Auto-enrollment procedures were in place, but they had not considered how to address employees who became eligible after hiring due to a change in status or position.
- (5) The sponsor was not reading or interpreting notices from the recordkeeper correctly. Therefore, the new recordkeeper rejected the "in limbo" transfer from the former recordkeeper because they didn't know how to allocate the funds.
- (6) The Plan requires a true-up contribution at the end of the year, and it was not made. Sometimes it is miscalculated. Occasionally it is made when it should not be made.
- (7) Forfeitures have been accumulating without being used.
- (8) The Plan did not have a fidelity bond or fidelity bond coverage was not sufficient.

### Incentive

Audits serve a valuable purpose for both participants and plan sponsors alike when appropriately performed. One of our concerns in changing to the proposed headcount approach is that it incentivizes employers to reduce their participant headcounts to avoid an audit. With continuing concerns about the availability of social security for future generations, most of America will likely be heavily relying on their retirement savings, including their 401(k) plan savings to fund their retirement. Using a headcount of participants with balances seems to disincentivize employers from offering auto-enrollment in the Plan or promoting the availability of this benefit to all employees appropriately.

One strategy that we feel would make the headcount change more acceptable, if it were to occur, would be to modify the audit waivers available to small plans. If the Plan were required to have an auto-enrollment feature, this would address the risk that employees were not being offered the opportunity to participate in the Plan. In addition, a calculation could be added to the 5500 to show the percentage of active employees participating in the Plan. Reporting the percentage of Engaged contributing as compared to Total employees could give comfort that the sponsor is appropriately engaging qualified employees. This straightforward formula is easily derived and provides valuable information to the DOL on the risk that employees may not be offered the Plan.

### Timing of this Proposal

We do not think that the timing is suitable for this change. Due to the ongoing impact of the pandemic, we have all seen significant staff shortages at our clients. As a result, many human resource professionals are overwhelmed trying to hire employees for their organization and other strategic tasks critical to running a business. This means they are more likely to take a "set it and forget it" approach to the Plan. As a result, there is a heightened risk that operational issues will go undetected, which we have found in recent audits.

## Recommendations

While we strongly disagree with this proposed change to the headcount at this juncture, we are sensitive to the attempt to help reduce the regulatory and cost burdens on small companies. Unfortunately, however, this approach may be a pyrrhic victory for plan sponsors.

We recommend the following:

- (1) Primarily we recommend NOT changing the headcount at this challenging time. During periods of operational disruption there are heightened risks of non-compliance. This is the exact time that participants need our help in protecting their accounts the most.
- (2) We recommend that you consider changing the requirements for small plans to obtain an audit waiver that includes an auto-enrollment feature.
- (3) We recommend that a task force be put together that includes vital stakeholders such as qualified plan auditors who audit small plans, Third Party Administrators (TPAs), recordkeepers, etc. to discuss the ideas for a different type of compliance audit for small Plans. These would be procedures specifically targeted at determining if they comply with their plan document and other key regulations deemed critical to preserving public confidence in these plans' administration.

Thank you for taking the time to read this. We appreciate the opportunity to share our perspectives and ideas with you. Please feel to reach out should you have any further questions. This dialogue should continue as we believe that the right solution that addresses participant risk and Plan sponsor costs can be achieved through alternative measures.

Respectfully,



Craig, Fitzsimmons & Meyer, LLP  
Robert R. Craig, Managing Partner