TRUCKER ✦ HUSS

BENEFITS REPORT

Proposed Changes to the Department of Labor's Voluntary Fiduciary Correction Program

KEVIN NOLT

DECEMBER 2022

On November 21, 2022, the U.S. Department of Labor (DOL) published proposed updates to its Voluntary Fiduciary Correction Program (VFCP). VFCP is designed to encourage employers to voluntarily comply with the Employee Retirement Income Security Act of 1974 (ERISA) by voluntarily correcting certain prohibited transactions and submitting those corrections to the Program for approval. (The approval is evidenced by receipt of a DOL "no-action" letter.) The proposed changes are the first updates to VFCP since 2006 and provide, for the first time, a self-correction feature for delinquent participant contributions and loan repayments, the most common prohibited transactions under ERISA. Below is a summary of the proposed changes to the VFCP.

Self-Correction for Delinquent Participant

The DOL generally requires that participant contributions and loan repayments be deposited as soon as the amounts can be reasonably segregated from the general assets of the employer. This is because, as of that time, these amounts become ERISA plan assets. An employer's failure to timely deposit participant contributions and loan repayments results in a prohibited transaction because, under DOL rules, such late deposits amount to

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Trucker ✦ Huss is pleased to announce…

Mia Butzbaugh becomes a Director of the Firm on January 1, 2023.

Congratulations to Mia! We look forward to her continued, valuable contributions to Trucker Huss in the years ahead.

impermissible loans from the plan to the employer, given that the employer had use of those plan assets during the period of delinquency.

Employers are permitted to submit prohibited transactions to VFCP, but are not required to do so. However, by filing under the Program, plan fiduciaries obtain relief from the DOL for penalties that may be imposed and an agreement from the DOL not to investigate the plan fiduciaries by reason of the late deposits. VFCP also permits employers to calculate lost earnings by using the DOL's on-line interest calculator. The calculator can be much simpler to use, and it may reduce the cost of the correction because the alternative is to calculate lost earnings using the participant's actual investment elections on file with the plan. VFCP further provides for a waiver of the 15% excise tax in certain circumstances, pursuant to Prohibited Transaction Exemption (PTE) 2002-51. Notwithstanding the benefits of correcting late deposits under VFCP, employers often elect to correct the prohibited transaction outside the Program, using general correction principles. The reasons for correcting outside of VFCP vary, but include a desire to avoid the time and cost of the VFCP application process and a general hesitation to disclose errors to the DOL.

Under the proposed changes to VFCP, self-correction would be allowed for certain delinquent participant contributions and loan repayments, thus providing plan fiduciaries with DOL relief without the time and cost associated with preparing and filing a VFCP application. (Under the self-correction procedure, the DOL will not issue a no-action letter.) The self-correction procedure requires employers to notify the DOL's Employee Benefits Security Administration (EBSA) electronically that they have self-corrected delinquent contributions and loan repayments, and the procedure is available only if:

- Participant contributions or loan repayments are remitted to the plan no more than 180 calendar days from the date of withholding or receipt.

  TRUCKER HUSS COMMENT: This timing requirement applies to the contributions and repayments, not to the deposit of the lost earnings. All but the most egregious delinquencies are deposited well before the end of this 180-day period and thus should meet this timing requirement.

- Lost earnings do not exceed $1,000 calculated from date of withholding or receipt.

  TRUCKER HUSS COMMENT: The lost earnings are *not* calculated from the date the assets could be reasonably segregated. The most common delinquencies incur lost earnings significantly less than $1,000, so all but the largest errors should meet this requirement.

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Sarah Kanter becomes a Director of the Firm on January 1, 2023.

Congratulations to Sarah! We look forward to her continued, valuable contributions to Trucker Huss in the years ahead.

- The plan or self-corrector must not be under investigation as defined under VCFP .

  TRUCKER HUSS COMMENT: "Under Investigation" generally includes both DOL investigations and IRS audits. See also the discussion below for the modifications to the definition of "Under Investigation."

- Self-correctors must use VFCP's online calculator to calculate lost earnings and an online web tool to complete and file the self-correction notice to the DOL. Self-correctors must also complete and retain the self-correction retention record checklist, which includes a brief statement explaining why the employer was late in forwarding participant contributions or loan repayments to the plan. Self-correctors must also retain proof of payment of the principal and lost earnings to the plan.

  TRUCKER HUSS COMMENT: The information required for the retention record checklist is similar to the items submitted with the VFCP application. This information must be provided to the plan administrator and maintained with other plan records in accordance with ERISA's record retention rules.

- Late deposits that are self-corrected through the Program would also qualify for excise tax relief via a corresponding change to PTE 2002-51.

  TRUCKER HUSS COMMENT: PTE 2002-51 would be amended to allow an employer to obtain excise tax relief for self-corrected late contributions meeting certain conditions and to provide that no notice to interested persons is required in connection with self-corrected late deposits. It also would eliminate the provision that makes applicants ineligible if, during the three years before submission of the current application, the applicant sought relief for a similar transaction under VFCP and the excise tax exemption.

The DOL considered, but did not include at this time, a limit on the frequency with which a self-corrector may use the self-correction feature instead of the formal application process for correcting delinquent participant contributions and loan repayments. However, the DOL notes that it will be monitoring for frequent use and may investigate plans to identify and correct systemic issues.

The DOL requires disclosure, in a supplemental schedule to the Form 5500, of whether the delinquent participant contributions and loan repayments are corrected in or outside of VFCP. It is not clear whether there will be any changes to the way this information is reported, given the addition of the self-correction component.

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Updates to Existing Transactions Eligible for VFCP

The DOL's proposed changes to VFCP also clarify and simplify the existing transactions eligible for correction under the Program, and include the following proposed changes:

- Conform revisions to the current application process for late participant contributions and loan repayments to reflect the new self-correction component.
- For transactions involving below-market interest rate loans to parties-in-interest, eliminate the requirement that an independent fiduciary validate in writing the process used to determine the fair market interest rate determination for loans in the amount of $10,000 or less. Instead, the plan fiduciaries would be allowed to submit the independent commercial lender's written determination of the fair market interest rate.
- For transactions involving below-market interest rate loans to persons who are not parties-in-interest, add an alternative payment method which permits the borrower's payment of the amortized outstanding loan balance over the remaining payment schedule of the loan at the interest rate that would have been applicable if the loan had originally been made at the fair market interest rate. Currently, the borrower pays the present value of the excess of the remaining payments at the fair market interest rate while continuing to pay the outstanding loan balance under the original repayment schedule for the duration of the loan.
- For transactions involving the plan's purchase of an asset (including real property) from a party-in-interest, add a third method of correction in situations when the purchase cannot be reversed or the asset retained because the plan no longer owns the asset (e.g., sale of the asset). Under the proposal, the plan can receive credit for the sale of the asset if a plan official provides a statement that the sale was upon the advice of an independent fiduciary and not in anticipation of applying for relief under VFCP. Currently, the plan does not get credit for any earnings on the sale which can result in a windfall to the plan because it could receive both earnings on the asset plus full correction under VFCP.
- For transactions involving the plan's sale of an asset (including real property) to a party-in-interest, the plan would be permitted to receive the correction amount (which is generally the amount by which the fair market value of the asset exceeds the sale price, plus lost earnings) rather than having to repurchase the asset, by permitting a plan official to determine that the asset cannot be repurchased (e.g., the asset has been destroyed). Previously, receipt of the correction amount was permitted only if an independent fiduciary determined that the plan would realize a greater benefit from that amount than it would from repurchasing the asset.
- For a sale and leaseback of real property to the employer, clarify that the correction is not limited to transactions involving the plan sponsor, but that it also applies to affiliates of the plan sponsor.
- Modify the definition of "Under Investigation" to provide that it includes an investigation of a plan which results from an EBSA staff review, which could include a review by an EBSA Benefits Advisor, if the plan received written or oral notice of the review. However, a plan would not be "Under Investigation" merely because EBSA staff has contacted the plan in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application.

The DOL believes these changes would encourage more voluntary corrections by offering plan officials and other responsible fiduciaries a streamlined correction process. The DOL also believes the changes would enable it to better allocate resources currently dedicated to processing VFCP applications for the transactions at issue.

The DOL is seeking public comments on the changes to VFCP through January 20, 2023 and will finalize the amended VFCP in a subsequent publication. We will notify our readers of any further developments as they arise.

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A message from the firm...

In keeping with our tradition, in lieu of sending holiday gifts, Trucker ✦ Huss has sponsored the following organizations:

Bet Tzedek is a Los Angeles nonprofit human rights and poverty rights organization embracing the fundamental commitment of achieving full and equal access to justice for all people.

East Bay Children's Law Offices strives to provide a voice for children in and out of the courtroom and promotes positive outcomes by making sure children are seen and heard in courtrooms and schools across the Bay Area and beyond.

Edgewood Center for Children and Families, the first children's nonprofit in the western United States, offers a full range of services for children, youth, and families in the San Francisco Bay Area. Their vision is that everyone they serve has the power to live life with understanding, confidence, strength, and joy.

El Nido Family Centers is a social service, 501(c)(3) nonprofit agency empowering families in low income areas of Los Angeles to break the cycle of poverty, child abuse, violence and academic failure.

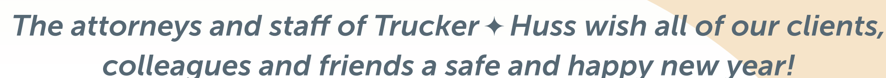
Gary S. Tell ERISA Scholarship Foundation provides two stipends each summer to law students or clerks who have chosen to spend their summer working on ERISA litigation matters for the Department of Labor in Washington D.C.

Huckleberry Youth Programs provides services that promote: safety in times of crisis; physical and emotional health and well-being; social justice in communities facing inequity; and educational success.

Legal Aid at Work is a nonprofit legal services organization that assists low-income, working families by providing free legal information, free clinics and helplines, by bringing class and individual actions, and by advocating for policies that strengthen civil and workplace rights.

Peggy Browning Fund provides unique opportunities for law students to work for economic and social justice through fellowships, workers' rights conferences, networking and other programs.

Pension Rights Center is a nonprofit consumer advocacy organization established in 1976 whose stated mission is "to protect and promote the retirement security of American workers, retirees and their families."



The attorneys and staff of Trucker ✦ Huss wish all of our clients, colleagues and friends a safe and happy new year!

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Final Rule Provides Permanent Automatic Extension of Time to Furnish Certain Affordable Care Act Tax Forms

SARAH KANTER

DECEMBER 2022

On December 12, 2022, the Treasury Department ("Treasury") and the Internal Revenue Service (IRS) released a "Final Rule" that automatically extends the timeframe for employers and other reporting entities to furnish IRS Forms 1095-B and 1095-C to individuals, regarding their health coverage each year, to March 2 of the following year (March 1 if a leap year). The Final Rule also provides an alternate method for furnishing Form 1095-B (but not Form 1095-C). This Final Rule is effective for calendar years beginning after December 31, 2021, so will apply to the furnishing of forms required for the 2022 calendar year.

Background

The Patient Protection and Affordable Care Act (ACA) went into effect on March 23, 2010, and contained, among many other things, two mandates intended to reshape the healthcare landscape in the United States — the individual mandate and the employer mandate. The individual mandate required individuals, beginning in 2014, to hold "minimum essential coverage"[1] or pay a "shared responsibility" penalty. The individual mandate was effectively eliminated in 2017 with the passage of the Tax Cuts and Jobs Act of 2017 ("Tax Cuts and Jobs Act") which zeroed out the shared responsibility penalty, although it did not eliminate the requirement for individuals to maintain minimum essential coverage. However, as discussed below, a small number of states have implemented their own version of the individual mandate which may include reporting and furnishing requirements. The employer mandate, which became effective in 2015,[2] applies to "applicable large employers"[3] and can subject those employers to a shared responsibility penalty if the employer fails to offer minimum essential coverage that is "affordable"[4] and provides "minimum value"[5] to its full-time employees (and their dependents).[6] The ACA created new Internal Revenue Code ("Code") provisions containing various reporting requirements to assist the IRS in the enforcement of the individual and employer mandates (described below).

Code Section 6055 is used to enforce the individual mandate and requires entities (e.g., health insurers or multi-employer trusts) that provide minimum essential coverage to an individual to report certain information to the IRS and to furnish a statement to the "responsible individual"[7] with the same information. IRS Forms 1094-B and 1095-B are used for this purpose, with Form 1095-B being the form that is furnished to individuals. Applicable large employers that provide self-funded health coverage to their full-time employees must use Part III of Form 1095-C to report this information instead of Form 1095-B. Applicable large employers who provide self-funded health coverage to part-time employees or non-employees may use either Part III of Form 1095-C or Form 1095-B for this purpose.

Code Section 6056 is used to enforce the employer mandate and requires applicable large employers to file information returns annually with the IRS and to furnish written statements to the employee with respect to the health coverage it offered to its full-time employees. Forms 1094-C and 1095-C are used for this purpose, with Form 1095-C being the form that is furnished to employees.

The statutory deadline for filing these forms with the IRS is February 28 (or March 31 if filed electronically) of the following year. The statutory deadline for furnishing these forms to applicable individuals is January 31 of the following year. Statements must be furnished to the applicable individual, and generally must be furnished on

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paper by mail (or hand-delivered), unless the recipient affirmatively consents to receive the statement in an electronic format. If mailed, the statement must be sent to the recipient's last known permanent address, or, if no permanent address is known, to the recipient's temporary address. Failure to timely furnish or file an information return can subject an entity to certain penalties under the Code.

In recognition of the short turnaround time (i.e., one month) to prepare and furnish the statements, the IRS has, every year the mandates have been in effect, provided an automatic extension for entities to furnish the forms to individuals.

In 2021, the IRS proposed regulations which, if finalized would (among other things) grant reporting entities an automatic extension of time (not to exceed 30 days after January 31) in which to furnish the statements, and would also provide an alternate method for furnishing Form 1095-B to the responsible individual.

The Final Rule

The Final Rule largely adopted the proposed rule with few changes. As noted above, the Final Rule contains two key changes to ACA reporting requirements: (1) an automatic extension of time to furnish Forms 1095-B and 1095-C to the applicable individual; and (2) an alternate method for furnishing Form 1095-B (but not Form 1095-C). Each change is described below.

Permanent Automatic Extension of Time to Furnish Forms

Employers and other reporting entities are given an automatic extension of time (not to exceed 30 days after January 31) to furnish the 1095-B and 1095-C to individuals. These forms will now need to be furnished on **March 2** of the following calendar year (March 1, if it is a leap year). For example, for the 2022 calendar year, Forms 1095-B and 1095-C will need to be provided to applicable individuals by March 2, 2023.

Alternate Method to Furnish Form 1095-B. The Final Rule also provides an alternate method that reporting entities (e.g., health insurance carriers, etc.) can use to furnish Form 1095-B to the responsible individual. The Final Rule permits a reporting entity to post a clear and conspicuous notice on the entity's website in a location that is reasonably accessible to the individual. The notice must:

- state that individuals may receive a copy of their statement upon request;
- include an email address, a physical address to which a request may be sent, and a telephone number that individuals may use to contact a reporting entity with any questions; and
- be written in plain, non-technical terms and with letters of a font size large enough, including any visual clues or graphical figures, to call to a viewer's attention that the information pertains to tax statements reporting that individuals had health coverage.

A reporting entity must post the notice on its website by March 2 (March 1 in a leap year) of the following calendar year and retain the notice in the same location on its website until October 15. The reporting entity must provide a Form 1095–B within 30 days of receipt of the responsible individual's request.

The alternate manner of furnishing will apply only to taxable years when the individual shared responsibility payment remains zero (in other words, if a future law reinstates a penalty associated with the individual mandate, the alternate method of furnishing will no longer apply). The preamble to the Final Rule explains that the rationale for this alternate method is that the Tax Cuts and Jobs Act effectively mooted the primary purpose for which individuals would need a Form 1095-B (by zeroing out the penalty). This alternate method does **not** apply to the furnishing of Form 1095-C. Also, as noted above, this would not apply to applicable large employers who provide self-funded health coverage to their full-time employees, as employers must report this information on Part III of the 1095-C, and the alternate method does not apply to the furnishing of the 1095-C. See below for a discussion of the requirement to furnish this information in states that maintain their own version of the individual mandate.

State Reporting / Furnishing Requirements

A small number of states have their own individual mandate, and thereby their own furnishing and reporting requirements. States with their own version of the individual mandate include California, Massachusetts, New Jersey, Rhode Island, and Vermont, as well as the District of Columbia. In the preamble to the Final Rule, Treasury and the IRS note that they have no authority over state

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reporting and furnishing requirements, and whether state deadlines for filing or furnishing will align with the Final Rule is a matter of state law. For example, in California the deadline to furnish information to individuals regarding their health coverage is January 31, but the Franchise Tax Board has stated that it will not impose a penalty for a failure to furnish this information by that date. Employers and other reporting entities located in a state with an individual mandate should review the requirements in their state with regard to the deadline (if any) to furnish information regarding health coverage to individuals, and determine whether or not the new alternate method of furnishing Form 1095-B, as described above, would satisfy state requirements.

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[1] Minimum essential coverage includes most kinds of health coverage such as employer sponsored coverage, government sponsored coverage and individual health insurance. Code Section 5000A(f)(1).

[2] The employer mandate was initially effective in 2014, but its enforcement was delayed until 2015.

[3] An "applicable large employer" generally means with respect to a calendar year, an employer who employed an average of at least 50 full-time employees during the preceding calendar year. Code Section 6056.

[4] Employer-provided coverage is considered affordable for an employee if the employee required contribution is no more than 9.5 percent (adjusted annually, 9.12% in 2023) of that employee's household income. In general, the employee required contribution is the employee's cost of enrolling in the least expensive coverage offered by the employer that provides minimum value.

[5] A plan provides minimum value if it covers at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan and provides substantial coverage of inpatient hospitalization services and physician services..

[6] There are two kinds of employer mandate penalties: (i) the penalty under Code Section 4980H(a) (also known as the "sledgehammer penalty") which can apply if the employer fails to offer minimum essential coverage to 95% of its full-time employees (and their dependents) and at least one of those employees receives a premium tax credit to help purchase coverage on the Health Insurance Marketplace; and (ii) the 4980H(b) penalty which applies if the employer does offer coverage to at least 95% of its full-time employees (and their dependents), but at least one full-time employee receives a premium tax credit to help purchase coverage on the Health Insurance Marketplace.

[7] The "responsible individual" is the person who, based on a relationship to the covered individuals, the primary name on the coverage, or some other circumstances, should receive the statement. Generally, the statement recipient should be the primary taxpayer, if that person is known.

FIRM NEWS

On December 5, **Dylan Rudolph** co-presented *ERISA's Fiduciary Duties: Recent and Significant Court Decisions,* for a Knowledge Group Webinar. Topics discussed were the latest regulatory trends and court decisions under ERISA, and implications for retirement plan fiduciaries.

On December 16, 2022, **Katuri Kaye** was recognized by the Peralta Community College District Retirement Board at their annual awards presentation for her important contributions and ongoing legal support.

The Trucker ✦ Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of Benefits Report are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for thepurpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this Benefits Report.

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