COMPLIANCE ALERT

Form 5500 Frequently Asked Questions (FAQs)

Insurance Brokers & Consultants

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Quick Facts

- The Form 5500 is a reporting and disclosure requirement used by the Department of Labor (DOL) to assess employee benefit, tax and economic trends in the private sector.
- The Form 5500 is due annually, seven months following the end of a plan year, which is July 31 for calendar year plans.
- Below are common questions associated with filing the Form 5500.

Introduction

The Form 5500 Series is part of the Employee Retirement Income Security Act's (ERISA's) reporting and disclosure requirements. It is a compliance, research and disclosure tool for the Department of Labor (DOL). Form 5500 acts as a disclosure document for plan participants and beneficiaries and a source of information and data for use by other Federal agencies, Congress and the private sector to assess employee benefits, tax, and economic trends and policies. The frequently asked questions (FAQs) below apply only to health and welfare benefit plans (e.g., medical, dental, life). Retirement (or pension) plans are also separately subject to Form 5500 filing requirements, but those requirements are not discussed below.

Form 5500 annual filings are in the public record. The Form 5500, associated schedules, electronic filing requirements, and other assistance are also available on the DOL **website**.

Frequently Asked Questions

Q. How do we count plan participants?

A. When determining whether a Form 5500 is required for an unfunded ERISA plan, it is only necessary to count enrolled employees and former employees, not spouses or dependents. The following are counted to determine whether a plan has 100 or greater participants:

- Current employees covered by the plan on the first day of the plan year (i.e., enrolled in benefits);
- Former employees covered by the plan on the first day of the plan year (i.e., COBRA or retiree participants); and
- Former employees who were eligible to elect coverage COBRA on the first day of the plan year.

NOTE: If a wrap document bundles multiple benefits into a single ERISA plan, the count is based on the number of unique participants across all benefits considered to be part of the same ERISA plan.

Q. When is the Form 5500 due?

A. The Form 5500 for an ERISA plan due date is the last day of the seventh month after the end of the ERISA plan year, including short plan years. So, for a calendar year plan, the Form 5500 is generally due on July 31. If the due date falls on a Saturday, Sunday, or legal holiday, the Form 5500 is due the next day that is not a Saturday, Sunday or legal holiday.

Q. Which plans are subject to ERISA?

A. Form 5500 filing requirements only apply to plans that are subject to ERISA, but most plans offered by employers to their employees and family members are subject to ERISA. Examples of ERISA benefits include, but are not limited to, a medical plan, a dental or vision plan, a health reimbursement arrangement (HRA), a health flexible spending account (FSA), life insurance, an employee assistance program (EAP), a disease-specific policy and an onsite medical clinic. Examples of non-ERISA benefits include, but are not limited to, a health savings account (HSA), a dependent care account plan (DCAP), a cafeteria plan and tuition reimbursement.

Certain employers are exempt from ERISA regardless of what type of benefits they offer. Plans offered by government, tribal, or church employers are NOT subject to ERISA and thus do not have to file a Form 5500 for any of their plans.

In addition, there is a safe harbor for specific voluntary plans. Voluntary plans meeting the following requirements are NOT subject to ERISA and do not have to file a Form 5500:

- No employer contributions;
- Participation must be voluntary; and
- Limited employer involvement (no employer endorsement).

Allowing premium payments on a pre-tax basis through the employer's cafeteria plan would be considered "employer involvement." In addition, most plans will fail the no-endorsement requirement and thus are subject to ERISA.

Finally, certain so-called payroll practices are not considered ERISA plans even though they may provide a type of benefit that is normally subject to ERISA. Most commonly, vacation, sick leave, PTO, and holiday pay from an employer's general assets are not an ERISA plan (but would be if those benefits are paid from a trust). Likewise, self-funded short-term disability plans paid from the employer's general assets are not ERISA plans (even though a fully insured STD plan would be subject to ERISA).

Q. Are there penalties for failure to file?

A. Penalties for failing to file Form 5500 include civil fines under ERISA §502(c)(1), which increase over time and can reach thousands of dollars per day. There are also civil penalties for late filings. These penalties cannot be contractually shifted to another party except in very specific circumstances. The formal sanction imposed by the DOL for failure to file a required annual report in a timely manner is $50/day, calculated from the date the annual report was first delinquent. However, the penalty can be significantly reduced if the plan sponsor voluntarily files late using the Delinquent Filer Voluntary Compliance Program.

NOTE: A rejected Form 5500 is considered not filed until it is corrected by the plan administrator.

The Employee Benefits Security Administration (EBSA), a branch of the DOL, offers an amnesty program called the Delinquent Filer Voluntary Compliance Program (DFVCP) for late filers who voluntarily submit a late Form 5500. Penalty amounts under the program are significantly reduced to as little as $10 per day, up to a maximum sanction of $4,000 per plan. Still, the filing under the

amnesty program must generally be initiated by the late filer, not by federal enforcement. **Find more information** about the DFVCP, including FAQs.

Q. How does a merger or acquisition affect the Form 5500?

A. The facts and circumstances in the merger or acquisition are important in determining Form 5500 filing requirements for affected ERISA plans.

- In some cases, the seller will terminate all ERISA plans and the acquired employees will move to the buyer's plan(s). In such cases, the seller will be required to file a final Form 5500. The Form 5500 instructions provide that a final Form 5500 should be made for the plan year ending when all plan assets have been transferred to the control of another plan.
- In other cases, the buyer may adopt or take over the seller's plans rather than terminate them. In these situations, a plan termination does not occur, but instead, upon filing Form 5500s following the acquisition, the plan name, plan number and plan sponsor information may need to be changed and should be indicated in Part II, Line 4 of the Form 5500 main body.
- Finally, there may be situations where separate ERISA plans are merged. In such situations, to avoid confusion, it may be desirable for both plans to be terminated and a new plan to be established. The two plans being merged would each file a final Form 5500. The new plan would check the first-time return box (Part 1, Box B of Form 5500 main body) on its first filing.

Q. If the insurance policy year differs from the ERISA plan year, what Schedule A information do I use?

A. While uncommon, sometimes contract years and ERISA plan years do not match. In this instance, use the Schedule A information for the policy or contract that ends during the ERISA plan year. For example, if the ERISA plan year is July 1, 2023, to June 30, 2024, and the insured benefit policy or contract year is Calendar Year, use the Schedule A information for the policy or contract ending December 31, 2023.

Q. Can I file one Form 5500 for multiple benefit plans?

A. Maybe. An employer needs to have an umbrella (bundled, mega) wrap document in place before various benefits can be filed together under a single Form 5500. If there is no wrap document bundling the benefits into a single ERISA plan, the default is to treat each benefit as a separate ERISA plan, in which case each plan would require a separate Form 5500. Filing benefits together without an appropriate wrap document could result in some benefits being deemed not filed at all and delinquent.

Q. Is there a statute of limitations regarding missing Form 5500 filings?

A. No. The DOL takes the position that there is no statute of limitations regarding missing Form 5500 filings. Technically, a Form 5500 must be filed for every year there is an ERISA plan subject to Form 5500 filing requirements, all the way back to when the reporting obligations began (1988), to be in full compliance. That being said, when delinquent filings are discovered, and plan sponsors (employers) are determining how far back to file, it is common that employers will simply go back three to five years. For late filings, it is recommended that plan sponsors use the Delinquent Voluntary Compliance Filing Program. (DVCFP).

Q. If two employers are part of the same §414 controlled group due to common ownership and share a medical plan with >100 participants, but neither employer has over 100 participants separately, are they required to file a Form 5500?

A. Yes. It doesn't matter for Form 5500 purposes how many employees a participating employer may have, but rather how many participants are covered by the plan in question. In this scenario, a single Form 5500 is required for the shared ERISA plan; each employer does not submit a separate Form 5500. For such plans, either employer, along with their Federal Employer Identification Number (FEIN), could be listed as the plan sponsor. Still, that information should generally be used consistently from one plan year to the next.

Q. Is a Form 5500 required for a stop-loss policy?

A. Generally, no. A stop-loss policy is typically purchased by the employer, is in the employer's name, and the employer is paying the premiums. Even if stop-loss premiums are factored into employee contributions, total plan expenses generally far exceed the stop-loss premium. A rare exception could be if the plan documents clearly state that employee funds are used to pay for the stop-loss policy, or if employee contributions exceed total plan costs.

Q. Does a small, self-funded plan need to file a Form 5500?

A. Generally, no. Smaller ERISA plans (<100 participants) are not subject to Form 5500 filing requirements unless the plan is "funded," meaning the plan funds are segregated from the employer's general assets, typically via a trust or Voluntary Employee Benefits Association (VEBA). This is not common, especially for small plans; most often, plan claims are simply paid out of the employer's general assets, in which case the plan is unfunded. On the other hand, if the plan is funded, a Form 5500 will need to be filed (no exception for small plans).

Note that a level-funded plan is typically treated as a self-funded plan. The employer's monthly contribution paid to the third-party administrator (TPA) for a level-funded plan is not a premium, but rather employer funds that are held until needed to pay claims, stop-loss premiums, administration fees, etc. If the TPA holds those funds in an account in the employer's name, the plan should be treated as unfunded, and no Form 5500 is required. Still, if the TPA holds those funds in an account in its own name or places the funds into a trust until needed, the plan might be considered funded, in which case a Form 5500 would be required even if the plan has <100 participants.

Q. Does my cafeteria plan have to file a Form 5500?

A. No. In 2002, the IRS indefinitely suspended the requirement that employers file an annual Schedule F and Form 5500 for fringe benefit plans (including cafeteria plans). This suspension did not affect other schedules or other information that employers subject to ERISA may have to include in the annual Form 5500 filing. For example, though an employer does not have to file anything for its cafeteria (pre-tax premium conversion) plan, it may still have to file a Form 5500 for a medical plan or health FSA that is run through the employer's cafeteria plan.

Q. Would a fully insured medical plan that pays consulting fees instead of commission need to include a Schedule C?

A. No. A Schedule C is used to report information about service providers paid by the plan. Still, Schedule C is only required if the plan is funded (meaning the plan's assets are segregated from the general assets of the plan sponsor, generally by the use of a trust or VEBA). Therefore, since most plans are unfunded, most plans are exempt from filing a Schedule C.

Q. If I change companies or file for multiple companies, do I need to register in EFAST2 under each company?

A. No. According to the DOL, it is not possible (or necessary) under EFAST2 for an individual who works for multiple companies to add each of the companies to the individual's profile. Although users provide employment information when registering, EFAST2 credentials are personal and not linked to a company or plan. Only one active registration is required, and credentials can be used to identify a registrant for multiple years and multiple filings.

EPIC Employee Benefits Compliance Services

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