

Employee Benefit ■ Plan Review

Ask the Experts

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SECTION 4960 EXCISE TAX

Q Our non-profit organization has a non-calendar year fiscal year. For purposes of determining whether any of our employees make more than \$1 million during the year and whether we are subject to the new excise tax, what year do we use? The calendar year or our fiscal year?

A The excise tax that you refer to is under Section 4960(a) of the Internal Revenue Code. Section 4960 was added to the federal tax code in December 2017 as part of the Tax Cuts and Jobs Act. Under that section, certain tax-exempt organizations who pay certain employees more than \$1 million during a year are subject to a 21 percent excise tax on the portion of that employee's pay in excess of \$1 million. (Section 4960 also provides for an excise tax on "excess parachute payments," which has its own rules and is not addressed by this response.)

The Internal Revenue Service ("IRS") initially answered this question in Notice 2019-09. The Notice provides that the measurement period is the calendar year. More specifically, the Notice provides that amounts paid during a calendar year are treated as being paid for the organization's tax year in which that calendar year ends. So, if your organization's tax year ends on September 30, then the measurement period for your organization's tax year that ends on September 30, 2020, will be the 2019

calendar year (since the 2019 calendar year ends within your organization's October 2019 through September 2020 tax year). But it is not as simple as looking at your employees' Form W-2s for each year.

For purposes of calculating employee pay for this rule, Section 4960 uses the term "remuneration," which is defined as Section 3401(a) wages, but excluding designated Roth contributions to a retirement plan and including amounts includible in income under Section 457(f) of the Internal Revenue Code. To add another level of complexity to this analysis, the Notice provides rules as to when remuneration is treated as paid. The general rule is that an amount is treated as paid if it is paid during the applicable calendar year. However, if an amount is subject to a substantial risk of forfeiture under Section 457(f), then it is treated as paid during the calendar in which the substantial risk of forfeiture lapses (i.e., upon vesting), even if paid in (and reflected on a Form W-2 for) a subsequent calendar year (for example, in January of the following calendar year as a short-term deferral under Section 457(f)). Some commentators felt this approach was unfair and unnecessarily complicated. However, the IRS continues to stand firm on these rules, for now anyway, as set forth in recently released proposed regulations under Section 4960.¹ The IRS will entertain comments on these rules before final regulations are published.

LATE FORMS 1094-C AND 1095-C FILINGS

Q Our company sponsors an insured medical plan. We prepare Forms 1095-C and 1094-C for our plan in-house and file the forms directly with the IRS electronically. This year, due to the COVID-19 pandemic, our business shut down from late March until early June. Although we did furnish 1095-Cs to employees by March 2, 2020, we did not file the 1094-Cs and 1095-Cs for our medical plan with the IRS until we were back up and running in June. I read that the IRS has extended some of the deadlines for certain filings with the IRS. Did the IRS extend the deadline for filing 1094-Cs and 1095-Cs? If so, what is the deadline? If not, will the IRS assess penalties for missing the deadline?

A The Internal Revenue Service, Department of Labor (“DOL”) and other government agencies have extended a number of deadlines related to employee benefit plan reporting and disclosure. Unfortunately, the IRS did not extend the deadline for filing 1094-Cs (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Return) and 1095-Cs (Employer-Provided Health Insurance Offer and Coverage) for the calendar year ending December 31, 2019.

Plans with 250 or more 1095-Cs or 1094-Cs generally are required to file the applicable form electronically by the IRS deadline. The deadline for filing required 1094-Cs and 1095-Cs electronically was March 31, 2020.

The penalties for failure to file a 1094-C or 1095-C with the IRS by the due date is generally \$270 per form. However, the penalty is reduced to \$50 per form for each form filed within 30 days of the due date or to \$110 for each form filed by August 1, 2020. Penalties are limited to certain maximum dollar amounts depending upon whether the company has more than \$5,000,000 in average annual gross receipts for the last three years.

Additional information and a list of the penalty amounts by date and size of the business are available on the IRS web site.²

In addition, the IRS does have the authority to waive penalties if the failure was due to reasonable cause and not due to willful neglect.³ Although the IRS has not, as of the date of this writing, issued specific relief or a waiver of penalties for failure to timely file 1094-Cs and 1095-Cs by the March 31, 2020, it is hoped that the IRS will take into account factors that may have prevented companies from filing required 1094-Cs and 1095-Cs. It may be helpful to document the specific reasons why your company was not able to file by the March 31, 2020 deadline, including the temporary cessation of operations and to document steps that were taken in advance of the cessation to prepare for the filings (for example, gathering information and having furnished or posted the 1095-Cs).

FORM 5500 AND SMM DEADLINES FOR CALENDAR YEAR PLANS

Q My company is in the process of preparing Forms 5500 for our tax-qualified pension, 401(k) and welfare benefits and summaries of material modifications (“SMMs”) for amendments that we made last year to some of our plans. The plan year for all of our plans is the calendar year, so the deadline for filing 2019 Forms 5500 and providing SMMs to participants for 2019 amendments is July 31, 2020. We have heard conflicting information on whether the deadlines for filing Forms 5500 and providing SMMs to participants have been extended. Have the deadlines been extended? If not, is there a way we can apply for an extension?

A The IRS has extended to July 15, 2020 the deadline for filing Forms 5500 that were due to be filed on or after April 1, 2020 and before July 15, 2020.⁴ However, the IRS has not, as of the date of this

writing, extended the July 31, 2020 deadline for filing 2019 Forms 5500 for employee benefit plans with calendar year plan years (“Calendar Year Plan”). The deadline for applying for an extension to file the 2019 Form 5500 for a Calendar Year Plan is July 31, 2020.

Although the deadline for filing Forms 5500 for Calendar Year Plans has not been extended from July 31, 2020, the DOL has extended the deadline for furnishing summary plan descriptions and SMMs that are otherwise required to be furnished from March 1, 2020 through the date that is 60 days after the announced end of the COVID-19 National Emergency (“National Emergency Period”).⁵ This notice provides that employee benefit plans and responsible plan fiduciaries will not be in violation of the Employee Retirement Income Security Act of 1974 (“ERISA”) for a failure to timely furnish a notice, disclosure, or document that must be furnished during the National Emergency Period, if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. Good faith acts may include the use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites. Since the deadline for furnishing SMMs for 2019 amendments to Calendar Year Plans would normally be July 31, 2020 and would therefore fall within the National Emergency Period, the deadline for filing the SMMs for your company’s plan will be 60 days after the end of the National Emergency Period.

REPORTABLE EVENT OF CHANGE IN CONTROLLED GROUP

Q My company is selling all of the stock of one of its

subsidiaries to an unrelated third party, and that subsidiary that is being sold sponsors a cash balance pension plan. The cash balance plan will stay with the subsidiary when it is purchased by the buyer in this stock deal. To what extent must notice be provided to the Pension Benefit Guaranty Corporation (“PBGC”) that this cash balance pension plan is leaving my company’s controlled group?

A Section 4043 of ERISA requires sponsors of single-employer defined benefit plans to provide the PBGC with written notice of the occurrence of certain reportable events that may signal problems with the plan or the plan sponsor that could result in a risk of loss to the PBGC. The reportable event rules are in place so that the PBGC can monitor covered plans and take action to terminate underfunded plans, if necessary.

There are a number of reportable events under ERISA Section 4043, and one of them, which seems likely to apply to your circumstance, is a change to the contributing sponsor of a controlled group. A reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons (including any person who is or was a contributing sponsor) ceasing to be a member of the plan’s controlled group (other than by merger involving members of the same controlled group).⁶

The term “transaction” includes, but is not limited to, a legally binding agreement, whether or not written, to transfer ownership, an actual transfer of ownership, and an actual change in ownership that occurs as a matter of law or through the exercise or lapse of pre-existing rights. Whether an agreement is legally binding is to be determined without regard to any conditions in the agreement.

If a waiver does not apply, the general rule is that the sponsor of the defined benefit plan must give

written notice to the PBGC of this reportable event within 30 days after the event. However, notice to the PBGC must be given 30 days in advance of this event for non-public plan sponsors if the aggregate unfunded vested benefits of all single-employer defined benefit plans maintained by the sponsor and members of its controlled group exceed \$50 million and the funded vested benefit percentage for the plans is less than 90 percent.⁷

Additional waiver events may apply, even if the plan would otherwise be subject to advance notice reporting, such as the waiver for plans with fewer than 500 participants and the de minimis five percent segment waiver.⁸ Otherwise, the requirement to give notice of this reportable event to the PBGC is waived if any of the following waiver events applies:

- The person that ceases to be a member of the plan’s controlled group represents a de minimis 10 percent segment of the plan’s old controlled group for the most recent fiscal year ending on or before the date of the reportable event.
- Each person that ceases to be in the controlled group is a foreign entity other than a foreign parent.
- The plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.
- Each post-event contributing sponsor of the plan and the highest level U.S. parent of each post-event contributing sponsor are low-default-risk on the date of the event.
- Reporting is waived under the low-default-risk safe harbor for an entity that has adequate capacity to meet its financial obligations in full and on time as of a financial information date. This can be demonstrated various ways.⁹

- The plan is in the well-funded plan safe harbor for the event year. This safe harbor applies if no variable-rate premium was required to be paid for the plan for the plan year preceding the event year (which means that the plan was 100 percent funded).¹⁰
- If any contributing sponsor of the plan, before the transaction, is a public company and the contributing sponsor timely files a Securities and Exchange Commission Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

For more information, see 29 CFR § 4043.29, which was revised effective March 5, 2020, to reflect various technical corrections, clarifications, and improvements as a result of the PBGC’s ongoing retrospective review of the effectiveness and clarity of its rules as well as input from stakeholders.¹¹ 🌐

NOTES

1. See 85 Federal Register 35746.
2. See <https://www.irs.gov/government-entities/federal-state-local-governments/increase-in-information-return-penalties>.
3. See Internal Revenue Code Section 6724 and Regulation Section 301.672401 and Proposed Regulation Section 1.6055-1 and Notice 2019-63.
4. See <https://www.irs.gov/pub/irs-drop/n-20-23.pdf>.
5. See EBSA Disaster Relief Notice 2020-1, available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01>.
6. See 29 CFR § 4043.29.
7. See 29 CFR § 4043.61.
8. See 29 CFR § 4043.62.
9. See 29 CFR § 4043.9.
10. See 29 CFR § 4043.10.
11. See 85 FR 6046 (Feb. 4, 2020).

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