COMMERCIAL INSURANCE
EMPLOYEE BENEFITS
PERSONAL INSURANCE
RISK MANAGEMENT
SURETY

PARKER | SMITH | FEEK

Q&A FROM ASSUREX GLOBAL WEBINAR

FORM 5500 – FILING AND PLAN STRUCTURE

AUGUST 23, 2018

Q. If you have a small group plan, do you need to complete Form 5500?	**A.** The general rule is that all ERISA plans covering 100 or more participants at the beginning of a plan year must file. "Participants" are employees. Don't include spouses or dependents. Additionally all "funded" ERISA plans and all MEWAs must file, regardless of size. "Funded" generally means that there are assets set aside, in the plan's name, to pay premiums or benefits. The Form 5500 Instructions under "Who Must File" are a good place to get started on this topic.
Q. A small company - under 100 - has to file a 5500 short form for the 401k plan but not the welfare plan correct?	**A.** The retirement plan rules (for 401(k), pensions, 403(b) plans, etc.) don't translate easily to the welfare side (health, life, disability, etc.). Generally speaking, a welfare plan that is unfunded (i.e., no assets set aside in the name of plan to pay premiums or benefits) with fewer than 100 participants at the beginning of the year will not need to file Form 5500. Also worth noting, welfare plans will almost NEVER be able to file the short form version of the Form 5500.
Q. We are a small company and only have 35 employees enrolled in the group health plan. Are we require to file?	**A.** Probably not, as long as your plan is not funded and is not a MEWA. See row 6 for more details.
Q. What if the medical plan at the beginning of the year has less than 100 but the Life/AD&D plan has 100. Does the employer have to file a 5500?	**A.** The answer is "yes" for the Life/AD&D plan and "no" for the medical plan -- if the Employer treats them as separate ERISA plans. If, however, the plans have been combined through a wrap document into a single plan, then the single plan will be subject to the Form 5500 filing.
Q. We have 5 benefit plans, 2 are funded, 3 are not. Guess we should wrap them into (2) wraps, funded and not funded?	**A.** There is more than one right answer to this question. You could wrap them all into a single plan and not worry about whether the unfunded plans go over 100 participants. Or you could keep them apart to avoid Form 5500 filing for the smaller plans, but you should watch the counts carefully.
Q. Do you report vision plans?	**A.** Yes. Vision plans are subject to ERISA.
Q. What is MEWA?	**A.** A MEWA is a group health plan sponsored by members of more than one controlled group. Association Health Plans are usually MEWAs. The same goes for group health plans that include independent contractors. For more information, take a look at the DOL's MEWA guide found at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf

Q. Does broker compensation based on consultation fees go on the 5500? I mean when it is directly billed to the client by the broker and therefore NOT administered by the carrier/TPA.

A. Are you thinking of Schedule C? Our view of Schedule C (not held by everyone) is that it is only needed for funded plans. Applied to your question, it probably means that such payments would show up on Schedule C if they were made from plan assets. This area is gray.

Q. Some health plans enroll 1099 contractors. Are these included in the count - participants?

A. The contractors would likely be treated as participants in other plans. But that doesn't mean you are off the hook. Health plans that allow independent contractors to participate are very likely MEWAs. That might trigger an M-1 filing requirement. For more information, take a look at the DOL's MEWA guide found at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf

Q. Is there a risk of reporting Voluntary (or other plans) that actually shouldn't be reported?

A. The risk is that you would certainly turn an otherwise "voluntary plan" that is not subject to ERISA into a plan that is subject to ERISA. The downside is that you would need to comply with various ERISA requirements, such as plan documents, SPDs, etc. The good news is that you have the protection of ERISA, e.g., State preemption, deference to plan administrator interpretations, etc.

Q. Who Files "plans covering 100 or more participants"? More than 100 elected coverage or more than 100 eligible for coverage?

A. The requirement kicks in at 100 or more active participants at the beginning of a plan year. Don't count individuals who are eligible but don't enroll. Spouses and dependents don't count towards the 100. See Form 5500 Instructions at "Section 1: Who Must File."

Q. Back in "What is a Plan" can you explain further the vacation benefits that need to be reported?

A. Most vacation benefits are not subject to ERISA thanks to a "safe harbor" regulation providing that "time off" benefits paid solely out of an employer's general assets are not subject to ERISA. You can find that regulation at 29 CFR §2510.3-1(b). The classic example of a vacation plan that IS subject to ERISA would be a funded time off plan sponsored by a union.

Q. Does the definition of participant include dependents, or is it just employees?

A. To determine whether you have 100 or more participants (for Form 5500 filing purposes) you count only Employees who are participating in the plan. See Form 5500 Instructions at "Section 1: Who Must File."

Q. Is a tele-medicine plan a qualifying plan required to file 5500?

A. There has been a lot of talk about this lately. If the tele-medicine plan is providing medical care then, yes, it is subject ERISA and the Form 5500 filing requirements. This is pretty easy when the plan is only offered to those who participate in the group health plan. In most cases you would just include the tele-medicine plan in the group health plan Form 5500 filings. It gets more complicated (and not just for Form 5500 reasons) if the plan is offered to all employees, regardless of whether they have enrolled in the group health plan.

Q. Or what about an EAP plan?	**A.** In most cases EAP plans are subject to ERISA. The critical question is whether they provide medical care or not. For Form 5500 purposes, the analysis is similar to the one provided for tele-medicine plans. When the EAP is only offered to those who participate in the group health plan, you would just include the EAP plan in the group health plan Form 5500 filings. It gets a bit more complicated if the plan is offered to all employees, regardless of whether they have enrolled in the group health plan.
Q. What is the paragraph # of the IRC Code that states "participant in plan" versus employees?	**A.** Form 5500 obligations for welfare plans are largely a product of ERISA -- not the Internal Revenue Code. It all starts at ERISA section 103. From there you can look at the corresponding regulations. The Form 5500 instructions also make it clear that you count enrolled participants.
Q. Are you going to address (per your invite) that 5500 filings might apply to small groups?	**A.** As mentioned in the webinar, Form 5500 filings are required for small plans (i.e., fewer than 100 participants at the beginning of a plan year) if the small plan is funded in any way. That generally means that assets have been set aside, in the name of the plan, to pay premiums or benefits. Employers with individual benefits or wrapped plans that are on the cusp of having to file should pay close attention to their plan size and may want to designate a plan year in advance.
Q. I see now that I should have filed a couple of years ago (I never counted participants in our life insurance plan). What do I do about the delinquency? Should I just start filing this year and move forward?	**A.** We strongly recommend the DOL's Delinquent Filer Voluntary Compliance Program. You can find more information at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/dfvcp
Q. We have over 1,300 employees and have Medical, Medical + Voluntary Accident & Critical Illness, Voluntary Disability, Voluntary Life Insurance, and Health Savings Accounts. Enrollment is over 100 in all plans with the exception of Dependent Day Care. We file the Form 5500 under one Plan #501. Is there any benefit to start "adding" plan numbers (502, 503, 504, etc.) for the Form 5500 filing? Also, how can it be determined which plans should not be filed on the Form 5500?	**A.** We tend to favor "wrapping" all components into a single ERISA plan with a single plan number rather than creating new plans. Give the combined plan a generic name such as "ABC Health and Welfare Benefit Plan." You can limit use of that name to the last few pages of the SPD, the plan document and the Form 5500 filing. Dependent day care centers are usually subject to ERISA but they are also usually exempt from the Form 5500 filing requirement and many other ERISA requirements. See DOL Reg. §2520.104-25 for more details.

Q. Could you talk about the relationship between an (IRS) SPD for a Section 125 Plan (which does not need a 5500) and the various benefit programs run through it? For example? Since an FSA is a self-funded health plan, does it have to file a 5500, or because it's part of a Section 125 is it excepted?

A. A section 125 "plan" isn't really a plan under ERISA and, therefore, doesn't require an SPD and isn't subject to the Form 5500 requirements of ERISA. Various components of a cafeteria plan may be ERISA plans. A healthcare FSA is a good example.

The healthcare FSA is subject to ERISA and must be included in a Form 5500 filing if there are 100 or more participants at the beginning of the plan year. The connection to a cafeteria plan doesn't provide any relief.

Q. Interesting that plan year does not need to coincide with policy year. Maybe address the pros and cons of having different years?

A. In our experience it is best to have the first day of the plan year be the same as the first day of an enrollment period. The two could be different, but that creates problems. There may be reasons (historical or financial, for example) when the policy year or contract period is different. There are fewer issues to keep in mind when they are the same, so we would have slight preference to keep them identical. But the financial or historical reasons surrounding the policy year probably should not drive the plan year or enrollment periods.

Q. Do you have a recommendation for a plan year time?

A. A plan year must be 12 months. Short plan years are OK in the case of plan year changes or plan mergers.

Q. What if plan 501 has 100+ participants but the others plans do not. Does only 501 Plan number need a filing?

A. Correct. The Form 5500 requirement is generally triggered when plans have 100 or more participants at the beginning of a plan year. In many cases employers will combine various benefits subject to ERISA (such as health, life, disability) into a single ERISA plan with a single ERISA plan number. In those cases the Form 5500 filing requirement is triggered when participation in any one of those benefits hits 100. Where the benefits are put in separate ERISA plans, each with their own documentation and plan number, the Form 5500 filing requirement may be triggered at different times, depending on the composition of each ERISA plan.

Q. If plans have different beginning plan dates ex: Dental/Vision January 1 and Medical, Life, LTD May 1, can I file combined 5500?

A. The answer is "yes" but there are some things you would need to do. The plans should be "wrapped" into a single ERISA plan, preferably with a wrap document. You would need to designate a single plan year for all of the benefits. In some cases the policy year or contract year will be different than the plan year. This requires a little more attention in dealing with Schedule A, but it is very workable.

Q. Can you distribute SAR electronically to some employees and hard copy to others that don't have access to computers? Or do you have to send hard copy all employees?

A. You can use multiple methods of distribution. For example, you could e-mail to all employees who use there own computer daily as a part of their job. You don't need their consent. For employees who don't use a computer as part of their daily job you would need to mail hard copies or go through the consent process for electronic distribution.