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401(k) Plans

The Correct 401(k)

With updated regulations providing more opportunities for correcting 401(k) plan errors, communication with clients and developing processes to assist plan sponsors in corrections are more important than ever.

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Some years ago, the Internal Revenue Service (IRS) provided a process for corrections of errors that commonly occur in retirement plans through the Employee Plans Compliance Resolution System (EPCRS). Effective July 16, 2021, Rev. Proc. 2021-30 provided additional guidance and expanded correction periods for certain items, to the excitement of 401(k) practitioners and for which you may find much commentary. This column will address how a 401(k) provider may provide value to its employer-clients using EPCRS.

To Correct or Not to Correct

Ultimately, though a provider may give guidance and recommendations, as well as prepare correction applications, it is up to the Plan Administrator whether to use the correction methods at hand. However, each provider must also determine whether they will offer correction guidance and application preparation or not. The choices are (1) not to participate in any corrections, (2) provide guidance and application services, or (3) some combination of guidance and preparation and referring more complex items out of house. Our practice has chosen to assist with the most common and straight forward types of self-corrections that fall within the examples provided by EPCRS and refer out anything with complexity or that might require the creativity of an attorney who specializes in qualified plan correction services in their practice, particularly for plan document or complex operational failures.

Oops!

But to back up in the process a bit, the question of each provider is whether it is part of their responsibility or offered services to proactively look for errors occurring in order to keep the plan in compliance. Most recordkeepers have some automated checks for late contribution deposits, missed loan payments and defaulted loans, as well as contributions exceeding 402(g) limits. It is generally the plan sponsors' responsibility to ensure that the appropriate correction is made upon discovering the error has occurred. But first, the plan sponsor must understand that they will be receiving regular communications that must be acted on.

It is up to the providers to educate the plan sponsor as to the roles of all involved, including how they might be informed if an error occurs. Automated emails are only effective if read. The plan sponsor must understand each of their provider's responsibilities and be clear about how to follow up on notifications if an error occurs. It is also a responsibility of the provider to ensure that the employer understands what service is NOT being provided, for example calculations and form preparation for a late deposit correction may not be offered by the recordkeeper and the plan sponsor will need to seek out their certified public accountant (CPA), third-party administrator (TPA), or attorney for assistance. This is particularly true if there is not a third party involved in reviewing year-end reports and compliance with the employer, looking to ensure that the operations of the plan are in compliance with the document and performing additional year-end checks and balances as many TPAs will do.

Will We Be Audited?!

Some care should go into communicating errors to plan sponsors. Notification by email to the person responsible for payroll that late deposits occurred, which has created a compliance issue and must be corrected immediately, serves the purpose of informing the plan sponsor there is an error, but may ignore the human side and the reality that we can be a little scary to some people. Frequently, notifications are quite factual and, particularly when warning about late Form 5500 filings, warn about alarming daily penalties that may mount up to huge maximum late fees of $150,000. As practitioners we want our clients to sit up and take notice that they must perform their duties. Our well-intentioned frank communications when they do miss something, sometimes frighten them quite a bit!

Give your client some grace when they make an error, particularly if it is the first time they have seen an error. Let them know this happens often enough that the IRS put together a correction program and perhaps that their error is common enough that it was one of the errors that was addressed explicitly! Let them know that showing a late deposit that was corrected right away on their 5500 probably isn't going to flag an audit (probably!), especially for those little plans with a small payroll. Or that a Form 5500 filed through the Department of Labor (DOL) Delinquent Filer Voluntary Compliance Program will give them a blessing by both the DOL and the IRS as if it were filed timely. Leave the factual "fix your error" emails for the serial offender scofflaws. We have all had to deal with those plans who seem to have 50 out of 52 payrolls submitted late. (Why do they always have weekly payrolls?) The scofflaws may deserve the "DOL will come find you and put you in jail" talk! Just be conscious of the anxiety level of the client. Being out of compliance truly terrifies some people.

Get It Done!

Finding the error and performing the correction calculations or preparing forms is only part way to completion. The plan sponsor must actually complete the steps, make the deposit, sign and mail the form, or sign the retroactive amendment. Whatever the last step that was required, is someone following up to make sure it was done? Who takes on that responsibility? Some TPA firms will walk through a correction from beginning to end and ensure that the plan sponsor got their correction completed. In other environments with a different service model, it may be left entirely up to the plan sponsor to work with their CPA or attorney, who will hopefully walk them through the process. Regardless of the service model, the plan sponsor needs to know how it will end and who is responsible for each piece. Communication is key to make sure that 401(k) plans are correct and corrected properly when they run afoul of regulations.

Consciously considering how you will address errors and use EPCRS and other correction programs (regardless of the service model you choose to implement) will be a significant value to your clients and is worth forethought and training to enhance your practice. ■