

## “What is a Form 5500? What Do I Do If One Was Never Filed for Our Plan?”

The Employee Retirement Income Security Act of 1974 (ERISA) provides an overall reporting and disclosure framework that is intended to ensure compliance with ERISA's rules. As part of this framework, the Department of Labor (DOL) developed the Form 5500 in order to satisfy the requirement under ERISA that employee benefit plans must file an “annual” report.

The Form 5500 Series is an important research source and disclosure tool for the DOL, Federal agencies, Congress, and the private sector in assessing employee benefit trends and developing policies. The DOL also uses the filings to identify and examine potential violations of ERISA.

The Form 5500 is comprised of a main body and various schedules, which detail the operation and financial condition of the plan. Which schedules a plan must include with the Form 5500 filing will depend on several factors, including the plan's size, funding method and whether the benefits are fully insured or self-insured.

### What Welfare Benefit Plan Must File a Form 5500?

In general, the following health and welfare plans (covered by ERISA) must file a form 5500:

- ✓ Large unfunded plans (or deemed unfunded by Tech. Rel. 92-01)
- ✓ Large insured plans
- ✓ Large combination unfunded/insured plans
- ✓ Plan required to file Form M-1: MEWAs
- ✓ Small funded plans (unless deemed unfunded by Tech. Rel. 92-01)

To qualify as a “large” plan, the plan must have *100 participants covered at the beginning of the plan year*. Under ERISA, a “participant” is any employee or former employee (who are COBRA qualified beneficiaries of an employer) who are or may become eligible to receive a benefit of any type from an employee benefit plan offered by the employer. Participants do not include covered spouses or dependent children.

**Helpful Hint:** A “self-funded” plan (a term commonly used to describe a self-insured plan) will not necessarily qualify as a “funded” plan. A self-funded (i.e., self-insured) plan that relies solely on the employer's general assets to make benefit payments will be considered “unfunded”. In addition, insured plans that use a trust or other separate account to hold plan assets will be treated as “funded” plans.

## When Do Form 5500s Need to be Filed?

The Form 5500 is required to be filed on the last day of the 7th month after the close of the plan year (including short plan years). If your ERISA plan year is a calendar year plan, the filing deadline is July 31st of the year following the end of the calendar year plan (e.g., the 2018 calendar year plan filing will be due on July 31st, 2019). The forms must be filed electronically as the DOL no longer accepts paper filings of any kind. Filing signers are assigned two identifiers under EFAST2—a PIN and a user ID—which together serve as a signature on the electronic filing. However, a third-party preparer may submit a Form 5500 on a plan administrator's behalf, using the third-party preparer's own credentials. Most Form 5500s (including schedules and attachments) submitted through EFAST2 are available to view by the general public at:

<http://www.dol.gov/ebsa/5500main.html>

An extension of up to 2 ½ months after the Form 5500 due date is available for employers that request an extension using Form 5558 (Application for Extension of Time to File Certain Employee Plan Returns). Form 5558 must be filed with the IRS not with the DOL. If Form 5558 is filed on or before the normal due date (not including the extension) of the Form 5500, the extension request will be automatically granted.

## What are the Penalties for Failure to Timely File?

ERISA provides civil penalties for failure or refusal to file a required Form 5500. Under ERISA, the DOL may assess a significant per-day civil penalty against a plan administrator, starting from the date of the administrator's failure or refusal to file a complete Form 5500. The maximum daily penalty is **\$2,140 per day**.

However, the DOL may impose lower penalties under the "Late-Filer Enforcement Program" and the "Non-Filer Enforcement Program".

- ✓ Late-Filer Enforcement Program Penalty is **\$50 per day** for each day Form 5500 is filed after is required due date.
- ✓ Non-Filer Enforcement Program Penalty is **\$300 per day** up to a maximum of **\$30,000 per year** for each plan year filing.

These enforcement programs are distinct from the Delinquent Filer Voluntary Compliance (DFVC) Program, which provides much lower penalties when the plan administrator voluntarily corrects the late or missed filing. The DOL's DFVC Program provides reduced civil penalties to plan administrators that failed to file the Form 5500s or that filed them late. A plan must voluntarily correct filings **before** receiving an in-writing notification the DOL for failure to timely file a Form 5500 or they are not eligible for the Program. Penalty amounts are assessed according to plan size:

- ✓ **Small plan:** \$10 per day for each day the Form 5500 is filed after the due date, capped at \$750 per plan.
- ✓ **Large plan:** \$10 per day for each day the Form 5500 is filed after the due date, capped at \$2,000 per plan.

For plans that have that have failed to file for more than one year:

- ✓ **Small Plan:** capped at \$1,500 per plan
- ✓ **Large Plan:** capped at \$4,000 per plan
- ✓ Penalties are capped on a **per plan** basis, not on a "per administrator" basis.

In short, voluntary correction is the best option when an employer realizes that they have not been filing the Form 5500 when they were required to do so. The employer should contact their legal counsel or employee benefit advisor to help them with the next steps in the filing process.

## One More Thing! The Summary Annual Report

The Summary Annual Report (SAR) is a narrative statement of the more important information contained in the plan's Form 5500. An ERISA plan administrator is required to provide the SAR to covered participants and certain beneficiaries. An unfunded welfare plan, regardless of size, need not provide a SAR even though they must file a Form 5500. In contrast, large insured plans must file a Form 5500 are subject to the SAR requirement because no exemption exists under the SAR regulation for such plans. The plan administrator generally must distribute the SAR **within nine months** of the close of the plan year. If an extension of time to file the Form 5500 is obtained, the plan administrator must furnish the SAR within two months after the close of the period for which the extension was granted.



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