SUMMER 2017
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EBP COMMENTATOR

THE NEWSLETTER OF THE BDO EMPLOYEE BENEFIT PLAN AUDIT PRACTICE

LOL... ROFL... BRB...

With the advent of social media, there has been a proliferation of new acronyms making their way into our everyday language. Even those who are not social media savvy may likely recognize some of these popular acronyms: LOL - Laughing Out Loud; ROFL – Rolling On Floor Laughing; BRB – Be Right Back. Similar to the world of social media, there are many acronyms pertaining to employee benefit plans (EBP). This edition explores several EBP acronyms we believe would be beneficial for plan sponsors to understand.

RMD

Contributed by Wendy Schmitz

RMD is short for Required Minimum Distributions. The Internal Revenue Service (IRS) does not allow retirement funds to be kept tax free indefinitely. At age 70½ participants are required to withdraw a minimum amount from their Individual Retirement Account (IRA), Simplified Employee Pension (SEP) IRA, SIMPLE IRA (Savings Incentive Match Plan for Employees), or retirement plan account (with some exceptions for Roth IRAs).

These distributions are not generally tax free nor can taxes be avoided by rolling the RMD into another tax-deferred account. The account owner is taxed at their regular income tax rate on the amount of the RMD withdrawn. Depending on the dollar amount of the RMD, no tax withholdings may be deducted from the amount distributed; however, the taxes would then need to be trued up on the account owner's annual federal tax return.

Sponsors of retirement plans (including 401(k), 403(b) and defined benefit pension plans) are required to ensure that RMDs occur timely. Despite the fact that a participant may be receiving RMDs [1], the sponsor is required to continue to make contributions on behalf of that participant (in accordance with the plan document) as well as allow the participant to continue to make salary deferrals, if appropriate.

For a participant's first RMD, the RMD may be delayed until April 1st of the year after the participant turns age 70½. For all subsequent years (including the year in which the participant first receives an RMD which was delayed to April 1st), RMDs must be made by December 31st. RMDs may also be delayed for participants who are still employed (although generally not available to employees who are deemed to be a 5% owner and certain relatives of such an owner) as well as for older 403(b) accounts (generally pre-1987 accounts).

1 RMDs may be taken on an annual basis. Additionally, as the name implies, these distributions are just minimums; a participant may be eligible to take additional distributions, if desired.

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For questions or to suggest topics for future editions, please contact Darlene Bayardo or Chelsea Smith Brantley.

Required minimum distribution rules also apply after a participant's death. In general, the IRS requires RMDs of the participant's death benefit even if death occurs before age 70½. Consultation with a qualified tax expert would be needed as death benefits are a complicated tax area.

Watch for changes in plan demographics since RMDs may become more common with an aging participant population. Some plan sponsors employ third party service providers, such as the plan record-keeper, to administer the RMDs. However, the ultimate responsibility of ensuring the plan is operated in accordance with the IRS rules and regulations still remains with the plan sponsor. Plan sponsors should obtain an understanding of the processes used by the service provider as well as what input or approvals the service provider requires from the plan sponsor in order to perform the distribution. Additionally, sponsors should monitor the service providers to ensure the RMDs are made on a timely basis.

There are consequences if RMDs are not made timely. For the individual participant, the amount not withdrawn timely is taxed at a 50% rate. In a worst case scenario, a failure to make timely RMDs to eligible participants could cause loss of the tax exempt status for the plan, which would have devastating effects on all plan participants as well as significant tax consequences for the plan sponsor. However, this is generally rare as regulators try to avoid plans disqualifications, due to the harm it causes participants. Regulators instead provide sponsors with the opportunity to correct operational defects, such as this, through the IRS correction program, Employee Plans Compliance Resolution System (more commonly referred to as EPCRS, yet another industry acronym). Under EPCRS, a plan sponsor may use either the Self-Correction Program (SCP) or the Voluntary Correction Program (VCP) to correct RMD failures. There are benefits to both methods. The SCP, which is generally for small timely identified errors, does not require a filing or filing fee with the IRS whereas the VCP requires filing of a form and payment of a filing fee. A key benefit to the VCP is that the IRS will waive the 50% participant tax if the plan sponsor requests the waiver as part of the filing submission. If the VCP is not used and the participant requests a waiver, each affected participant or beneficiary must individually apply for a waiver of the 50% tax using the Form 5329 as part of their federal income tax return.

Understanding and monitoring RMDs is an important focus for sponsors since there are, to put it in social media terminology, consequences IRL (In Real Life) for missed or untimely RMDs. On a more serious note, RMDs are complex and consultation with a qualified tax expert is recommended. BDO is available to assist sponsors and fiduciaries in addressing the rules and considerations associated with RMDs.

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MEP

Contributed by Mary Espinosa

Multiple employer plans (also known as MEPs) are sometimes incorrectly interchanged with *multiemployer plans*. Despite the misperception, these terms are not the same and are actually very different:

- MEPs are either defined benefit or defined contribution retirement plans adopted by two or more employers that are not treated as related entities (in other words, the employers are not members of a controlled group, commonly controlled group or affiliated service group).
- Multiemployer refers to a plan maintained under one or more collective bargaining agreements to which more than one employer (usually within the same industry, such as a labor union) is required to contribute.

MEPs can be structured in various ways. An *open MEP* is offered to employers that have no connection to each other aside from their participation in the MEP. Open MEPs are generally provided by an independent investment advisory firm or an organization created specifically to provide benefits to smaller employers. Alternatively, a *closed MEP* is generally sponsored by an industry or trade group. In a closed MEP, the employers must have the ability to control or exercise authority over the MEP. A *Professional Employer Organization* (PEO) is an arrangement whereby the PEO hires the client company's employees and is the employer of record for tax and insurance purposes. The MEP is sponsored by the PEO and adopted by the PEO's clients. A *common ownership MEP* is when the adopting employers do have some common ownership, but the ownership is insufficient for them to be considered related employers under the Internal Revenue Code (IRC).

Two or more employers can also pool their contributions to provide group health and other welfare benefits, such as dental, vision, life and disability in multiple employer welfare arrangements (MEWAs). Contributions can be made by both employees and employers based on the estimated costs associated with the number of covered employees. MEWAs are offered by the same types of organizations that sponsor MEPs.

Under the IRC, a MEP is treated as a single plan and must comply with certain qualification rules, including the exclusive benefit requirement, eligibility and vesting, etc. However, a MEP may or may not be treated as one plan under the Employee Retirement Income Security Act of 1974 (ERISA). For example, open MEPs usually do not meet the common interest criteria and, as such, each adopting employer is considered to be maintaining a separate plan and therefore each plan potentially may have both a separate Form 5500 filing requirement as well as a separate audit requirement, depending on the number of participants. In its **Advisory Opinion 2012-04A**, the Department of Labor (DOL) discusses the criteria it considers in determining whether a MEP may or may not be treated as one plan. Such criteria includes how members are solicited, who is entitled to participate, the purposes for which the association was formed, and who controls and directs the activities and operations of the benefit program.

MEPs and MEWAs may provide a solution for small employers looking to provide large plan benefits to their employees, while at the same time reducing administrative and cost burdens and minimizing fiduciary responsibility (including reporting and disclosure requirements). However, there are complexities associated with these plans. For instance, depending on whether the MEP is structured as closed or open, there may be a need for separate adoption agreements for each adopting employer, etc. Additionally, there may be limitations on an employer's ability to exit a MEP and the ability of that employer's employees to take their money out of the plan. Since the exit of one employer would not ordinarily terminate a MEP, technically the plan has not experienced a distributable event and, if there is no distributable event, employees would then be required to wait until a distributable event occurs in order to take a distribution.

The IRS provides guidance on MEPs through its IRS Internal Revenue Manual, Part 7, Chapter 11, Section 7 (Section 6 discusses multiemployer plans). **IRS FAQs** also address frequent questions the IRS receives.

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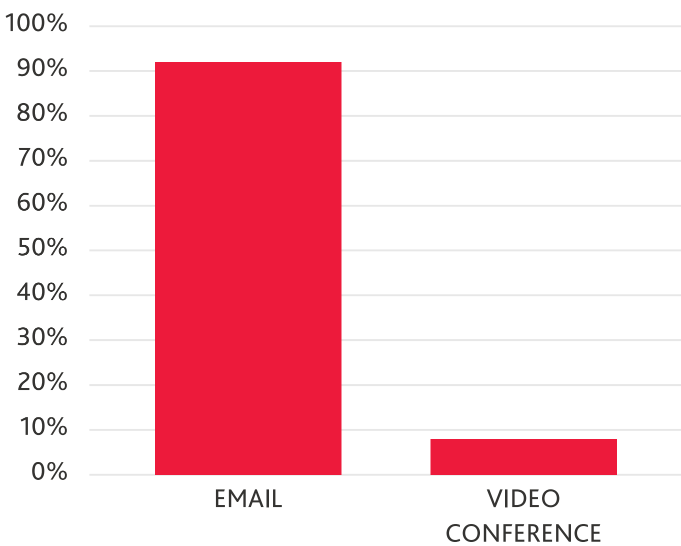
HWC

Contributed by Joanne Szupka and Chelsea Smith Brantley

There's no doubt about it – how we communicate (HWC) benefit information to employees can be challenging. According to a recent study released by the International Foundation of Employee Benefit Plans (IFEBP), 65% of the employers noted employee benefit education is a high priority[2] for their organization. Despite prioritizing such education, only 19% of the respondents indicated their employees have a high level of understanding regarding employee benefits. This low level of understanding may be linked to employees not opening or reading employer communication materials as 80% of the employers surveyed cited this as a problem. Clearly, there is a communication gap.

Communicating with employees about available benefits (whether retirement, medical or other) is a key responsibility of Human Resource personnel. Earlier this year, we conducted our own survey as to how people prefer to receive their information. Here is how the results stacked up:



An overwhelming majority (92%) noted that they prefer email for benefit-related communications whereas only 8% would opt to receive the information via video-conference. Our survey respondents voted down other methods of communication, such as in-person, over the phone, Skype or text.

Of course, how such information is communicated is only one component of effective benefit plan communications. Here are three critical mistakes typically found in benefits communication and how to fix them:

1. DEPLOYING A SINGLE METHOD OF COMMUNICATIONS

The channel in which you communicate with your audience (think: text, email, phone call, written letter) matters! Pick the wrong method of communication and people could miss your message entirely.

WHAT YOU CAN DO? Where possible, segment your communication by audience. Talking to millennials? Try sending the information via text message. Need to reach a baby boomers? A phone call may work better.

2. LONG AND CONFUSING MESSAGES

You may be an expert in benefit plans, but your audience members probably are not. Messages that are technical can result in audience frustration and messages that are too lengthy might not even be read.

WHAT YOU CAN DO? Keep your messages concise and free of jargon. Easy-to-understand charts and a glossary of uncommon terms can help.

3. ONLY SENDING YOUR MESSAGE ONCE

Your audience is busy and gets hundreds of emails a day. Your challenge will be to cut through the clutter. If you only send your message once, it's likely to be overlooked.

WHAT YOU CAN DO? Start early and plan a cadence or reminder messages so your audience doesn't miss an important notice.

2 https://www.ifebp.org/pdf/benefits-communication-survey-results.pdf

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LUFTR

Contributed by Darlene Bayardo and Chelsea Smith Brantley

Here are some of the latest updates from the regulators (LUFTR):

HURRICANES HARVEY AND IRMA RELIEF

Due to the impact of Hurricanes Harvey and Irma, government agencies have announced relief measures, several of which directly impact employee benefit plans as highlighted below:

- The IRS has granted relief to impacted taxpayers, which includes the postponement of several tax filing and payment deadlines. The relief provides an automatic extension of time to file certain tax returns through January 31, 2018. This includes taxpayers who had a valid extension to file their 2016 returns (including Form 5500) through October 16, 2017.
- The IRS also announced that employer-sponsored retirement plans can make participant loans and hardship distributions available to participants and certain members of their families who live or work in the affected disaster areas designated for individual assistance by the **Federal Emergency Management Agency (FEMA)**. It relaxes procedural and administrative rules that normally apply to participant loans and hardship distributions, including the abatement of the six-month ban on employee contributions following the hardship distribution. This relief also allows individuals who live outside the disaster area to take a loan or hardship distribution to assist family or other dependents who live or work in the disaster area. However, the IRS has stressed that the tax treatment of such loans and distributions remains unchanged. The relief is available through January 31, 2018.
- The DOL has issued **compliance guidance** for impacted plans and **FAQs for affected participants and beneficiaries**.
- The PBGC has announced it is waiving late premium payment penalties and extending certain other deadlines for affected plans. **The PBGC's announcement** provides information on the disaster relief, including which plans are eligible and how to make a claim for relief.

AICPA

The AICPA has extended the public comment period on the proposed Statement on Auditing Standards (SAS), *Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA* from the original deadline of August 21, 2017, to September 29, 2017. As discussed in our **Spring 2017** edition, there are significant proposed changes in the **Exposure Draft**. Responses should be submitted to **Sherry.Hazel@aicpa-cima.com**.

IRS

- The IRS issued a memorandum in April 2017 to the Employee Plans (EP) staff confirming that a cash balance formula based on only a portion of the participant's annual compensation can meet the "definitely determinable" requirement so long as the formula is not subject to employer discretion under the plan provisions. The memorandum states that, if a plan provides for employer discretion to determine the portion of compensation taken into account, that plan violates the "definitely determinable" rule and therefore the plan will not be treated as a qualified plan for tax purposes. On the other hand, if the plan terms do not allow for employer discretion, benefits will be considered "definitely determinable" even though the employer may have the inherent ability to determine the amount of compensation. Sponsors of cash balance plans should assess the cash balance formulas to ensure they meet the "definitely determinable" requirement under this guidance.
- The IRS released **Notice 2017-37** in June 2017, which provides the Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Contribution Plans for 2017. This list identifies updates in the qualification requirements of the IRC, which must be incorporated in plan documents submitted to the IRS when requesting an opinion letter through the pre-approved plan program.
- IRS **Revenue Procedure 2017-41** (Rev. Proc. 2017-41), released July 2017, outlines revised IRS procedures regarding issuance of opinion letters on qualification of pre-approved plans and discusses the elimination of separate pre-approved letter programs for volume submitter and master and prototype programs through the creation of a single opinion letter program. The Rev. Proc. is intended to encourage employers to switch from individually designed plans to pre-approved plans and is effective October 2, 2017.
- In July 2017, the IRS released **Rev. Proc. 2017-43**, which includes changes to the existing procedures for a suspension of benefits under a multiemployer defined benefit pension plan that is in "critical and declining status." The Rev. Proc. must be followed and is effective for applications submitted to the Treasury Department for approval of a suspension of benefits on or after September 1, 2017.

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- As discussed in our **Spring 2017** edition, the IRS recently issued guidelines for substantiating safe-harbor hardship distributions from 401(k) and 403(b) retirement plans. The IRS hosted a podcast in July 2017, that addressed guidelines provided to IRS agents who audit plans on how to review hardship distributions where sponsors have elected to use the "summary substantiation" method. The discussion highlighted that plan sponsors and third party administrators should review the guidelines in conjunction with plan procedures and processes when setting plan procedures. A recording of the podcast is available at **www.stayexempt.irs.gov/home/resource-library/retirement-plan-resources**.

DOL

- The DOL's fiduciary rule currently has a phased-in transition period (with respect to the rule's specific disclosures and representations) that ends January 1, 2018. The DOL recently requested information from the public regarding the rule, including whether the compliance date should be delayed. It has now asked the Office of Management and Budget for a delayed compliance deadline of 18 months until July 1, 2019. In the request, the DOL noted that it is contemplating lessened restrictions on the types of transactions permitted under the rule, which affects certain insurance products and rollovers of IRAs.
- In August 2017, the DOL issued FAQs explaining the interaction of the fiduciary rule with the 408(b)(2) service provider fee disclosure rules. The FAQs address:
  - The impact of the fiduciary rule on 408(b)(2) disclosures as covered service providers who provide (or expect to provide) fiduciary services are generally required to affirm whether they are acting as a fiduciary.
  - Whether recommendations to participants or IRA owners to contribute or increase contributions to a plan or IRA constitute fiduciary investment advice.
  - Whether recommendations to employers and other plan fiduciaries on plan design changes intended to increase plan participation and plan contribution rates constitute fiduciary investment advice.

PCAOB

The Public Company Accounting Oversight Board (PCAOB) has adopted a new auditing standard, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, that applies to audits conducted under PCAOB standards, including audits of employee benefit plans that file an annual report with the Securities and Exchange Commission on Form 11-K.

The new standard includes a requirement for the auditor's report to disclose the tenure of an auditor, specifically the year in which the auditor began serving consecutively as the entity's auditor. In addition, it will also include the phrase, "whether due to error or fraud," in describing the auditor's responsibility under PCAOB standards to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatements.

Plans subject to filing a Form 11-K are exempt from the requirement to include a discussion of the critical audit matters[3] (CAMs) in the auditor's report, but may choose to do so voluntarily. The standard is effective for audits for fiscal years ending on or after December 15, 2017.

3 These are matters that have been communicated to the audit committee, are related to accounts or disclosures that are material to the financial statements, and involve especially challenging, subjective, or complex auditor judgment.

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Events, People and Places

SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM) ANNUAL CONFERENCE AND EXPOSITION

EBP Assurance and Tax professionals, Grand Rapids Assurance Director **Luanne MacNicol** (left) and ERISA National Practice Leader and Specialized Tax Services Managing Director **Kim Flett** (right) attended the national SHRM conference in New Orleans, Louisiana in June, 2017. Representing BDO at the executive booth with the theme "We've Got You Covered," Luanne, Kim and other BDO professionals met with attendees from all over the world. Employee benefit plans were the topic of discussion with matters ranging from plan audits, compliance reviews, plan design and other benefits administration. This important conference provided an opportunity to demonstrate BDO's skilled knowledge and expertise in the many complex areas of employee benefit plans.

MEET BDO'S NATIONAL PRACTICE LEADER FOR EMPLOYEE BENEFIT PLAN AUDITS

Beth Garner leads BDO's National Employee Benefit Plan audit practice. A partner in BDO's Atlanta office, she is actively involved in EBP activities within both the firm and various industry and professional organizations, including the AICPA Employee Benefit Plan Audit Quality Center Executive Committee. Beth brings a depth of experience as a long-time EBP auditor as well as a client's perspective on the challenges facing plan sponsors from her prior private industry career experience. Through her leadership, BDO continues to pursue excellence in both audit quality and client service.

HELPFUL WEBSITES

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BDO EBP PRACTICE

Nationally recognized in the field of employee benefit plan consulting and auditing, BDO audits approximately 2,000 plans in a range of sizes (from smaller participant plans with under 100 participants to plans with over 400,000 participants). Our plan audit engagements are staffed with accountants experienced with all types of audits including defined contribution (401(k), profit sharing, ESOP and 403(b) plans), defined benefit (pension equity or cash balance) and health and welfare plans (defined benefit or defined contribution). We have extensive ERISA knowledge of audit and filing requirements, including full-scope, limited-scope, SEC Form 11-K filings and Master Trusts. Our plan audits are delivered through a streamlined process, tailored individually to the benefit plan and the plan sponsor.

Our professionals are actively involved at the local, state and national levels with many serving in leadership roles in the accounting profession as senior advisors and as active members of several governing boards and CPA societies. For example, our professionals currently serve on various AICPA committees, such as the AICPA's Employee Benefit Plan Audit Quality Center Executive Committee, the Employee Benefit Plan Expert Panel, the Technical Standards Subcommittee of the Professional Ethics Executive Committee, Employee Benefit Plan Tax Technical Resource Panel and the Health Reform Task Force. We are extensively involved with the AICPA National Conferences on Employee Benefit Plans.

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