

REGULATORY Update



An Overview of Form 5500: Rules, Deadlines, and Corrections

Retirement plans are entities in and of themselves and, as such, are subject to annual reporting to the federal government.

The Form 5500 series is a set of annual reports required by the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) for employee benefit plans, including retirement plans such as 401(k)s and pensions, and some health and welfare plans. It serves as a reporting and disclosure tool, providing information about the plan's financial condition, investments, and operations. The form aims to ensure that employee benefit plans are operated in accordance with the law and in the best interests of plan participants.

Whether you sponsor a defined contribution or defined benefit plan, you will be required to file annually. Plan sponsors may be able to leverage their recordkeeper or third-party administrator for Form 5500 support but should also contact a tax accountant if needed.

Form Variations

The specific Form 5500 you need to file depends on the characteristics of your plan, primarily by the number of participants with a balance.

- **Form 5500:** Used for plans with 100 or more participants who have a balance at the beginning of the plan year. These plans also require an independent audit report.
- **Form 5500-SF (Short Form):** A simplified version for plans with fewer than 100 participants with a balance.
- **Form 5500-EZ:** Designed for one-participant plans (Solo 401(k)s), which are plans covering only a business owner (and/or spouse) or a business partnership (and/or spouses) with no employees.

Exemptions, Extensions, and Corrections

Not all employer plans require filing Form 5500. The following plan types are exempt:

- IRA-based plans such as SIMPLE IRAs and SEP IRAs
- Governmental and church plans
- Solo 401(k) plans with total assets below \$250,000

Form 5500 (all versions) is due to the IRS seven months from the end of the plan year. Check your plan document for specifics of your plan year. Most plans follow the calendar year (January 1–December 31), whereby the deadline is July 31.

Filers are able to delay their deadline by filing Form 5558 (by July 31 in the same example) to receive a 2½ month extension (to October 15) if needed.

Late filing can result in penalties from both the IRS and DOL. Plans subject to ERISA (Form 5500 and Form 5500-SF filers) may use the DOL's Delinquent Filer Voluntary Compliance Program to avoid higher civil penalty assessments by satisfying the program's requirements and voluntarily paying a reduced penalty.

If you discover that your form was filed with errors or a missing signature, plan sponsors must submit an amended filing as a complete replacement of the previously submitted form. Be sure to mark the appropriate box to indicate it is an amended return.



Correcting Retirement Plan Errors Under EPCRS

“To err is human, to forgive is divine.” I doubt that Alexander Pope was thinking about a tax collection agency showing forgiveness when he wrote this more than 200 years ago, but the IRS does provide guidance to employers on fixing plan errors to minimize the impact to both plan sponsors and employees. The IRS created the Employee Plans Compliance Resolution System (EPCRS) to help employers make timely and reasonable corrections to plan errors, providing relief from further qualification issues. Through several Revenue Procedures, the IRS provides guidance based on the severity of the error. There are three general programs to correct errors:

- **Self-Correction Program (SCP):** Plan sponsors are permitted to correct certain plan failures without contacting the IRS or paying a fee.
- **Voluntary Correction Program (VCP):** Plan sponsors are permitted to pay a fee and receive IRS approval for correction of plan failures (any time before a plan audit).
- **Audit Closing Agreement Program (Audit CAP):** Plan sponsors are permitted to pay a sanction and correct a plan failure while the plan is under audit.

Which program to choose will depend on the facts and circumstances of the error and the impact to participants. The IRS provides specific guidance on some of the most common errors that occur—such as eligible employees not being included in the plan, late salary deferrals, missed employer contributions, plan documentation errors, and other common issues—in a series of guides for employers called Fix-It guides. There are Fix-It guides for 401(k)s, SEP and SIMPLE IRAs, and 403(b) plans. The IRS encourages employers to fix issues as soon as they are discovered with timely good faith corrections that can result in a lower cost to the employer and less impact to participants.

With SECURE 2.0, the IRS provided additional guidance on what an “eligible inadvertent failure” is, thus expanding when an employer can use the lower-cost Self-Correction Program. These are failures that:

- Are not identified by the IRS prior to any attempt to implement a self-correction
- Are corrections that are completed within a reasonable period after the failure
- Are not egregious
- Do not involve the misuse of funds
- Are not related to any abusive tax avoidance transaction
- Occur despite established procedures for compliance with IRS regulations

Making a mistake is only human, they happen. As a plan fiduciary, how you decide to address that mistake can have far reaching implications to your business if not resolved timely. Plan sponsors should consult with their plan administrators or tax advisors on the best methods for correcting errors to avoid further impact to their business.



How Control Groups Can Affect Retirement Plans for Small Businesses

When a control group exists within a multi-owner series of businesses, it can have significant administrative effects on retirement plans. Identifying a control group is complex with multiple types of control groups and many ways ownership can be attributed to individuals.

When a business owner is deemed to be part of a control group, the IRS views all the businesses together as if they are a single entity for the purposes of sponsoring a retirement plan. Impacts to retirement plans across businesses can include the coordination of things such as nondiscrimination, compensation and contribution dollar limits, minimum participant testing, eligibility, coverage, vesting, and top-heavy rules. An entrepreneurial business owner with an owner-only 401(k), SEP IRA, or SIMPLE IRA may suddenly be affected by buying or creating another business with employees. A retirement plan may no longer be “owner-only” as you may need to decide to include your new business in your existing plan or consider creating a new plan that better serves your new larger organization.

Here are the control group types:

Parent-Subsidiary control group.

When one or more chains of corporations are connected through ownership with a common “parent.” Control is determined by a series of ownership percentage tests based on owning at least 80 percent of the organization.

Brother-Sister control group.

To determine control, this test involves five or fewer common owners who have:

- **Controlling interest:** Generally means 80 percent or more of the stock of each corporation (but only if such common owner owns stock in each corporation); and
- **Effective control:** Generally more than 50 percent of the stock of each corporation, but only to the extent that such stock ownership is identical with respect to such corporation.

Spousal and family relationships can be an additional factor in determining the amount of controlling interest a person has in multiple businesses.

Spouse Ownership.

A spouse that owns their own business will not be attributed to owning the other spouse's business if there is:

- No direct ownership
- No participation in the company, and
- No more than 50 percent of business gross income is passive

Parent/Grandparent/Children/Grandchildren.

A lineal descendant's ownership in a separate business can be attributed to the business owner's controlling interest. If, however, the lineal descendant owns less than 50 percent of the business, the descendant's ownership will not be attributed to the main business owner.

Determining controlling interest can be very complex and nuanced, resulting in critical decision-making in plan establishment and ongoing administration. Business owners should consult a qualified attorney, tax advisor, or administrative professional to help them understand the impact of control groups when owners have interests in multiple businesses.