

Publications

Newly Released 2023 Form 5500s Reflect Significant Changes

ATTORNEYS & PROFESSIONALS

Ellen Goodwinegoodwin@groom.com

202-861-6630

Louis T. Mazaweylmazawey@groom.com

202-861-6608

PUBLISHED

11/29/2023

SOURCE

Groom Publication

SERVICES

Employers & Sponsors

- Fiduciary & Plan Governance
- Retirement Programs

Retirement Services

- Investment of Plan Assets
- Plan Services & Providers

The Department of Labor (“DOL”), Internal Revenue Service (“IRS”) and the Pension Benefit Guaranty Corporation (“PBGC”) (collectively, “Agencies”) recently released the 2023 Form 5500s containing significant reporting changes for the 2023 year. The new Forms and instructions reflect reporting changes that were adopted in a regulatory package [issued in February of 2023](#). See Annual Reporting and Disclosure, Final Rule, 88 Fed. Reg. 11793 (Feb. 24, 2023); Annual Information Returns/Reports, Final Forms Revisions, 88 Fed. Reg. 119984 (Feb. 24, 2023). They represent another step in the steady march by the Agencies to substantially add to the information reported on the Form 5500 and its complexity. With each new round of Form 5500 revisions, it becomes more and more clear that the Agencies view the Form 5500 as a major enforcement and oversight tool.

We note here the key changes in the Forms to be aware of during the 2023 Form 5500 filing season.

- **New Schedule DCG:** The 2019 SECURE Act added a new consolidated Form 5500 filing option for multiple plans that participate in a “defined contribution group” (or “DCG”). To be eligible to file a consolidated Form 5500 as a DCG, a group of defined contribution plans must have (1) the same administrator, (2) the same named fiduciaries, (3) the same trustee, (4) the same plan year, and (5) the same investments or investment options. A Schedule DCG must be attached to the Form 5500 for each individual plan within the DCG. The Schedule DCG provides plan-level information about each plan within the group, including participant counts, financial information and compliance questions. Each plan in the group that is subject to an audit requirement must attach the auditor’s report to the Schedule DCG.

- **Relaxed Participant Counting Method for Audits of Defined Contribution Plans:** Under ERISA, certain small retirement plans covering fewer than 100 participants are exempt from the requirement to have an audit. The 2023 Form 5500 and Form 5500-SF Instructions have been modified to reflect the new participant counting method for purposes of determining whether the plan must be audited. Under the new counting method, beginning in 2023, a defined contribution plan must count only those participants with an account balance at the beginning of the plan year to

determine whether the plan covers 100 or more participants and is subject to audit. This change should help many plans avoid the expense and headache of an audit if they were close to the 100 participant threshold in previous years. Brand new plans must count the number of participants with account balances as of the end of the plan year.

- **Schedule H Plan Expenses Lines:** Schedule H has been updated to add new breakout categories to the administrative expenses reported on the Income and Expenses section of Schedule H. Several new expenses lines have been added, including new lines for actuarial expenses, audit fees, legal fees, trustee/custodial fees, valuation/appraisal fees, and others. These lines will require plans to break out expense categories with more granularity, and enable DOL to more closely oversee plan expenses paid for various services.
- **Schedule MEP for Multiple Employer Plans:** A new Schedule MEP has been added to house information regarding multiple employer plans, including information regarding participating employers (and their percentage of total contributions and aggregate account balance information) that was formerly reported on an attachment to the Form 5500. Schedule MEP also includes questions related to Pooled Employer Plans (or “PEPs”) and compliance with the Form PR filing requirements (the pooled plan provider registration form). The Schedule also records the type of multiple-employer plan involved – whether a pooled employer plan, association retirement plan, PEO or other multiple employer plan – with certain MEPs required to complete various sections.
- **Schedule R Expansion:** Schedule R, filed by retirement plans, has been expanded to add several new IRS tax compliance questions in Part VII. The questions relate to nondiscrimination testing, ADP testing and pre-approved plan IRS determination letters. In addition, line 19, requiring the reporting of asset allocations for DB plans that have 1,000 or more participants, has been revised.

It is worth noting that Form 5500 reporting failures carry with them the potential for significant civil penalties. Currently, the DOL has the authority to assess civil penalties of up to \$2586 per day against a plan administrator that fails to file a complete or accurate Form 5500, and that amount increases each year. The IRS has separate authority to assess penalties of \$250 per day (up to \$150,000) for failing to file a Form 5500 in the case of a qualified plan. These potential penalties should motivate plan sponsors to have a diligent process for complying with the Form 5500 reporting rules as they continue to evolve.