

Critical Challenges Facing Pension Withdrawal Liability

Prepared by:
Eric W. Gregory
Dickinson Wright PLLC



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Critical Challenges Facing Pension Withdrawal Liability

By Eric W. Gregory

Member, Dickinson Wright PLLC, Troy, Michigan

EGregory@DickinsonWright.com; 248-433-7669

Eric Gregory's practice is focused primarily on the areas of ERISA, employee benefits, and executive compensation. He advises clients on all aspects of employee benefits including qualified retirement plans, welfare plans, and nonqualified compensation programs. He regularly provides advice and analysis to employers on employment tax and reporting issues that may arise with respect to employee compensation.

The Basic Reporting Requirements

Information Returns, Generally

The Internal Revenue Code ("Code")¹ requires taxpayers, including employers, to file information returns under statutes and regulations requiring persons that pay wages, dividends, interest, and other items to report these amounts to the IRS, so that the IRS can determine whether the recipient has properly reported them. These obligations are generally referred to as the "information reporting requirements."

Code Section 6041(a) requires a person making one or more payments to another person during a calendar year to report the payments to the IRS if they (1) are made in the course of a trade or business of the payor, (2) amount to at least \$600 during the year, and (3) consist of "rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gain or profit," such as activities of tax-exempt organizations and qualified retirement trusts.² Most of these payments are reported on the 1099-series of IRS forms.

Form W-2, Generally

Special rules apply to the reporting of "wages." An employer is required to report "wages" subject to withholding on Form W-2.³ Additionally, an employer must also

¹ Unless otherwise indicated, all Code Section references in this document are to the Internal Revenue Code of 1986, as amended ("Code").

² See Treas. Reg. 1.6041-1(b).

³ See Treas. Reg. 1.6041-2(a). Withholding is required for "wages," defined by Code Section 3401(a) as "all remuneration (other than fees paid to a public official) for services performed by

include on Form W-2 amounts that are not subject to withholding, including the cash value of compensation paid in other forms, if the aggregate amount paid to the employee (including all wages subject to withholding) is at least \$600.⁴

Form W-2 is filed annually to report wages and amounts withheld. Copy A of Form W-2 along with Form W-3 Transmittal of Wage and Tax Statement must be filed by January 31 of the following year. Employers who file 250 or more Forms W-2 must file electronically unless they are granted a waiver. Copies B, C, and 2 of Form W-2 are furnished to employees by January 31 of the following year.⁵

In 1990, an “other” box was added to Form W-2 to report amounts of compensation paid that might not otherwise be reportable in the “wages, tips, and other compensation” box. Today, that box is represented by box 12 on Form W-2. Today, box 12 has a number of sub-categories that can be reported, each with an assigned code ranging from A to HH. Box 12 codes provide more information and determine whether the specific amount reported in box 12 is income. If the amount is determined to be a part of gross income, it is also included in W-2 box 1. Each W-2 box 12 code is either a single or double letter code.

Reporting the Cost of Employer-Sponsored Health Coverage

Requirement to Report Employer-Sponsored Health Coverage

The Patient Protection and Affordable Care Act of 2010 added Code Section 6051(a)(14), which provides generally that the “aggregate cost” of “applicable employer-sponsored coverage” must be reported on Form W-2. This requirement is for informational reporting purposes to provide useful and comparable information to employees on the cost of their health care coverage. Nothing in the reporting requirement or in IRS guidance about this requirement can cause otherwise excludable employer-provided coverage to become taxable.⁶

an employee for his employer,” including noncash remuneration. Wages may include voluntary as well as contractual payments, vacation and dismissal pay, amounts withheld from an employee’s pay under state law (for example, mandatory contributions to retirement plans), and deferred payments even if the employer-employee relationship no longer exists when the payment is made. See Treas. Reg. 31.3401(a)-1; Rev. Rul. 2004-110; Rev. Rul. 2004-109; Rev. Rul. 82-46; Rev. Rul. 80-124.

⁴ Treas. Reg. 1.6041-2(a).

⁵ See General Instructions for Forms W-2 and W-3 (2021).

⁶ Notice 2012-9.

“Applicable employer-sponsored coverage” means, with respect to any employee, coverage under any group health plan made available to the employee by an employer, and which is excludable from the employee’s gross income under Code Section 106, or would be so excludable if it were employer-provided coverage.

For this purpose, a “group health plan” is a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. For purposes of identifying whether a specific arrangement constitutes a “group health plan” employers are permitted to rely on a “good faith” application of a “reasonable interpretation” of the law and applicable guidance, including the regulations defining “group health plan” at Treas. Reg. 54.4980B-2, the COBRA regulations.⁷ Under those regulations, a group health plan is generally defined as a group insurance policy or one or more individual insurance policies in any arrangement that involves the provision of health care to two or more employees.⁸ These regulations define “health care” as “the diagnosis, cure, mitigation, treatment or prevention of disease, and any other undertaking for the purpose of affecting any structure or function of the body.” However, a program that “furthers general good health, but [...] does not relate to the relief or alleviation of health or medical problems and is generally accessible to and used by employees without regard to their physical condition or state of health [...] is not a group health plan.” Therefore, many “wellness programs” will not be included in this definition of “group health plan.”⁹

The “aggregate reportable cost” includes the cost of coverage under the employer-sponsored group health plan of the employee and any person covered by the plan because of a relationship to the employee, including any portion of the cost that is includable in an employee’s gross income. Therefore, the aggregate reportable cost is not reduced by the amount of the cost of coverage included in the employee’s income.

Reportable Amounts

The total cost including both the employer-funded cost and the employee-funded cost is required to be reported. Employers report the employee-funded cost regardless of whether the employee paid this cost through a cafeteria plan on a pre-tax basis, or on a post-tax basis.¹⁰

⁷ Notice 2012-9.

⁸ Treas. Reg. 54.4980N-2, Q&A-1(a).

⁹ Treas. Reg. 54.4980B-2, Q&A-1(b). However, a wellness program will need to be reported as part of the total aggregate cost if the employer charges a COBRA premium.

¹⁰ Notice 2012-9, Section III, Q&A-14.

The value of group health insurance coverage that is provided to an employee that is taxable must also be reported. So, for instance, the value of group health insurance provided to a child of an employee who is 27 or older at the end of the calendar year, or the value of coverage provided to a non-dependent domestic partner, should also be included in the amount reported on the Form W-2.

However, the cost that is taxable to a highly compensated individual under a discriminatory self-insured medical plan is not included on the amounts reported on Form W-2. A self-insured plan that discriminates in favor of highly compensated individuals regarding eligibility to participate or the benefits provided under the plan must include any “excess reimbursements” in the individual’s gross income under Code Section 105(h). This excess reimbursement included in the individual’s income should be subtracted from the cost of coverage to determine the cost to report on the W-2.

There are three permissible methods for computing the reportable cost:

1. Employers may use the COBRA premiums that apply to the plan for the calendar year as the reportable cost.
2. For plans that do not calculate a COBRA premium, but instead charge COBRA beneficiaries an estimate of the COBRA premium, a “modified” COBRA premium method is permitted, using a reasonable good-faith estimate of the COBRA applicable premium or the COBRA applicable premium for each period in the prior year.
3. An insured plan may use the premium the insurer charges for the employee’s coverage as the cost to report on the Form W-2.

Mid-Year Changes and Non-Calendar Year Plans

The Form W-2 is prepared on a calendar-year basis. However, not all health plans are operated on a calendar year basis. If the health plan is not operated on a calendar year basis, the COBRA premiums are generally not calculated on a calendar year basis. In this case, the reportable cost must be calculated on a “period” basis, which for most employers means a “monthly” basis, as most plans charge premiums on a monthly basis. If there are changes in COBRA or insurance premiums mid-year, termination of employees, or changes in employee elections, employers may report those changes on a monthly basis. If there are changes mid-month, employers may use a reasonable method to reflect those changes.

If an employee terminates during the year and elects COBRA coverage, employers are permitted to determine whether to include the cost of COBRA coverage in the cost of group health coverage reported. Employers must use a consistent approach with respect to this reporting for all employees terminated during a plan year.

If there is a mid-year acquisition, both the predecessor employer and the successor employer are required to report the cost of the group health insurance coverage that they provide. However, an election may be made to allow the successor employer the ability to prepare a single Form W-2 for the employee for the entire calendar year.

Common Paymasters

When multiple related employers use a common paymaster to pay employees, the common paymaster is required to report the cost of coverage. However, if multiple related employers do not use a common paymaster, only one employer may elect to pay the total cost of all group health care coverage on its W-2, or each employer may report an allocated portion of the total cost.



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