WELLS THOMAS

Plan Sponsor Quarterly Update

wellsthomas.com | 203-483-9998

SPRING EDITION 2025

What’s New: DOL Expands Voluntary Fiduciary Compliance Program

Earlier this year, the Department of Labor released new rules for its Voluntary Fiduciary Compliance Program (VFCP). Happily, the rules include a new, long-awaited self-correction feature for plan sponsors.

What is VFCP? The DOL’s VFCP is a program that enables employers and plan sponsors to correct fiduciary breaches and other prohibited transactions while also generally avoiding DOL civil enforcement actions and penalties. Certain violations corrected under VFCP are also eligible for relief from excise taxes associated with the breach or prohibited transaction. Though not entirely comparable, the DOL’s VFCP is often thought of as similar to the IRS’s Voluntary Corrections Program (VCP): VFCP allows plans to correct violations related to duties under ERISA, and VCP allows plans to correct violations related to requirements under the Tax Code.

Who is eligible for VFCP? Employers are generally eligible so long as: (1) they are not under investigation by a relevant government agency, (2) the application does not show evidence of possible criminal violations of ERISA, and (3) the employer has not been subject to a DOL investigation related to this matter for which the DOL sent a referral to the IRS.

Pursuant to the DOL’s VFCP guidelines, a plan or other VFCP applicant is generally considered “under investigation” if:

(1) The DOL has notified a plan official of a plan investigation or an investigation of the potential VFCP applicant or plan sponsor in connection with an act or transaction directly related to the plan.

(2) A governmental agency is conducting a criminal investigation of the plan, the potential VFCP applicant, or plan sponsor in connection with an act or transaction directly related to the plan.

(3) The IRS Tax Exempt and Governmental Entities division is conducting an examination of the plan, or

(4) The PBGC, any state attorney general, or any state insurance commission is looking into the plan, the potential VFCP applicant, or the plan sponsor in connection with an act or transaction directly related to the plan (unless the VFCP applicant gives the DOL sufficient notice).

What can plan sponsors self-correct? Until very recently, there were no self-correction options under VFCP — meaning that all corrections pursuant to VFCP required filing a correction application with the DOL and waiting on DOL approval. Beginning in May of this year, plan sponsors may now self-correct failures related to: (1) late-deposited participant contributions and (2) plan loans. Additionally, for certain types of errors that are eligible under VFCP, the DOL release expands PTE 2002-51 to permit retroactive excise tax relief.

The issue of late-deposited participant contributions is one plan sponsors frequently encounter — and, until this year, generally required correction via a lengthy filing with the DOL. Now, plan sponsors may generally self-correct these errors so long as: (1) the total lost earnings amount due to the plan is $1,000 or less and (2) the correction is made within 180 days of the initial withholding. This 180-days limit has been the subject of some industry frustration. For small plans, it is often common practice to look for late contributions only at year-end during a TPA’s review of plan data — meaning that some late contributions may fall outside of the 180-day window by the time the plan sponsor finds the error.

Plans may also self-correct “eligible inadvertent” plan loan mistakes — generally meaning that the loan failure must have occurred despite reasonable policies and procedures, the loan failure cannot be “egregious,” and the loan failure cannot represent abusive tax avoidance or a misuse of plan assets.

What does the self-correction process look like? VFCP’s new self-correction process doesn’t mean plan sponsors and officials don’t have to file *anything* with the DOL. The new amendments to VFCP require that notice of self-correction be filed with the DOL and include brief information about the plan, the plan sponsor, the error, and the number of impacted participants. Applicants who submit the notice will receive confirmation of the DOL’s receipt but need not wait on DOL approval. Applicants hoping to take advantage of the new retroactive excise tax relief under PTE 2002-51 must also provide a notice of the correction to certain interested parties.

Especially regarding late-deposited participant contributions, plan sponsors should be excited to hear that the DOL now permits them to correct fiduciary errors without a formal application filing.

Best Practices: Understanding Types of Plan Compensation

Welcome to the land of ERISA: a place where ideas that seem straightforward often prove the most complex. Plan compensation is one such concept. Though it seems simple at first, a comprehensive understanding of how compensation is defined in your plan document can set you up for success by providing a solid base for plan operation — including benefit calculation.

There are generally four alternate definitions of plan compensation:

1. W-2 Wages: The amount of compensation listed on a participant's W-2 in Box 1 ("Wages, tips, and other compensation"). This generally includes all earnings, *minus* pre-tax retirement and benefit deductions, *plus* taxable benefits.

2. Section 415 Compensation: This generally includes all taxable compensation (e.g., salary, bonuses, commissions) and excludes items not currently included in taxable income (e.g., nontaxable fringe benefits, worker's compensation, and nontaxable group term life insurance).

3. Simplified Section 415 Compensation: This is generally identical to Section 415 Compensation, though it excludes certain types of compensation that are often reserved for highly compensated employees (e.g., taxable moving expense reimbursements and non-qualified deferred compensation).

4. Section 3401(a) Wages: Generally, this includes all wages within the meaning of Code Section 3401(a), plus amounts that would be included in wages but for an election under Code Sections 125(a), 132(f)(4), 402(e)(3), 402(h)(1)(B), 402(k), or 457(b).

For participant-owners who are considered "self-employed," the corporate organization of the entity sponsoring the retirement plan can also have a large impact. Sole proprietors and partners, for example, will generally look to earned income — while S-Corporation owners and C-Corporation owners will generally look to the plan's definition of compensation. The owners of limited liability entities (such as LLCs, LLPs, and PLLCs) are generally treated in accordance with the entity's tax election. For example, the owner of an LLC that elects to be taxed as a partnership will be treated the same as a partner.

When thinking about plan compensation, **the plan document controls**. Always carefully review the plan's definition of compensation to determine whether a compensation element should be included in or excluded from plan compensation.

Below is a chart looking briefly at common inclusions and exclusions:

Compensation	W-2 Wages	Section 415 Compensation	Simplified Section 415 Compensation	Section 3401(a) Wages
Wages, Salaries, Overtime, Bonuses, Commissions	Included	Included	Included	Included
Tips	Cash tips included, unless <$20 per month	Included	Included	Cash tips included, unless <$20 per month
Differential Wage Payments (to Military Service Members)	Included	Included	Included	Included
Non-taxable Reimbursements	Excluded	Excluded	Excluded	Excluded
Taxable Reimbursements	Included	Included	Included	Included
Pre-tax Elective Deferrals to Qualified/403(b) Plan	Excluded (but generally added back under plan)	Included	Included	Excluded (but generally added back under plan)
Pre-tax Deferrals to §125 Plan	Included	Included	Included	Included
Pre-tax Contributions to Non-qualified Plan	Excluded	Excluded	Excluded	Excluded
Taxable Portion of Premiums for Group Term Life Insurance	Included	Included	Included	Excluded
Nonqualified Stock Options	Included	Included at grant, excluded at exercise	Included at grant, excluded at exercise	Included
Amounts from the Sale of Disposition of Qualified Stock Options	Excluded	Excluded	Excluded	Excluded
Nonqualified Plan Distributions	Included	Excluded	Excluded	Included
Deductible Moving Expense	Generally excluded if paid to third party; included if paid to employee	Excluded	Excluded	Generally excluded
Non-deductible Moving Expense	Included	Excluded	Excluded	Included
Taxable Sick/Disability Pay	Included	Included	Included	Included
Worker's Compensation	Excluded	Excluded	Excluded	Excluded
Taxable Fringe Benefits	Included	Included	Included	Included, unless specifically excluded under Section 3401(a)
Non-taxable group-term life, dependent care, education assistance, fringe benefits	Excluded	Excluded	Excluded	Excluded
Medical Benefits from Employer Provided Contributions	Included	Excluded	Excluded	Included
Severance Pay	Excluded	Excluded	Excluded	Excluded

Hot Topic:
IRS Releases Proposed Regulations on Automatic Enrollment

We are roaring into 2025 riding a high-speed train, and the IRS was the first to board. On January 10, 2025, the IRS issued two proposed regulations relating to SECURE 2.0 — including one aimed at providing more guidance about SECURE 2.0's automatic enrollment provisions.

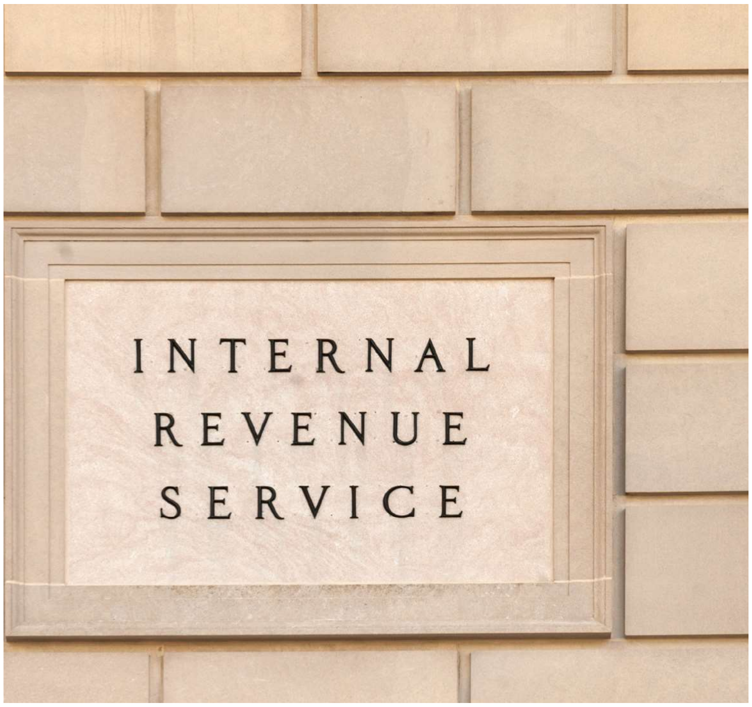
Context: SECURE 2.0 requires that all newly established 401(k) and 403(b) plans automatically enroll employees (unless they opt out) at an initial contribution rate between 3% and 10%. The provision takes effect this year and applies to all 401(k) and 403(b) plans established after December 29, 2022. Certain exceptions apply, including new and small businesses, governmental plans, and church plans.

Grandfathered Plans: The proposed regulations include special provisions for "grandfathered plans"— meaning those established before the enactment of SECURE 2.0. The proposed regulations would clarify that such grandfathered plans may join MEPs and PEPs formed after enactment and still retain their grandfathered status. This would mean that grandfathered plans could join MEPs or PEPs without becoming subject to automatic enrollment. This is great news for many practitioners and should promote increased usage of MEP and PEP plan options.

Small Business and Counting Requirements: As mentioned above, SECURE 2.0's new automatic enrollment provisions do not apply to small employers. SECURE 2.0 defines a small employer as one that normally employs 10 or fewer employees — but, before these proposed regulations, employers were left guessing as to how the IRS was defining "normal" for these purposes. The proposed regulations offer some helpful clarification and would provide that a business is considered to have "normally" employed 10 or fewer employees if, and only if, it had 10 or fewer employees on at least 50% of its typical business days during the year.

Coverage: The proposed regulations clarify that the new automatic enrollment provisions, once added to a plan, would apply to all participants in the plan — including those who were hired before the automatic enrollment mandate took effect. The proposed regulations do note, though, that participants hired before the automatic enrollment provision's effective date who already have an affirmative election in place (including an election to opt-out of participation) are exempt, and do not need to be automatically enrolled.

The IRS is accepting comments on the proposed regulations now and has scheduled a public hearing for April 8th.



by Hannah Munn, Partner, Poyner Spruil
Hannah's practice is focused in the areas of Employee Benefits and Executive Compensation. She works with business owners and HR executives to understand and manage employee benefits and executive compensation arrangements. She routinely represents clients before the Internal Revenue Service, Department of Labor, and Pension Benefit Guarantee Corporation and has extensive experience in virtually all aspects of employee benefits.