may/june 2014

Retirement PLAN news

Back to basics: Record retention

It's a well-known fact that the Employee Retirement Income Security Act of 1974 (ERISA) established specific reporting and disclosure obligations for qualified retirement plans. Less well known but equally important is the fact that ERISA also spells out how long a plan sponsor must retain plan documents and records that support those obligations.

The topic of record retention can be broken into three general areas:

1. What records should be kept?
2. How long should they be kept?
3. How should they be archived?

The short answers are:

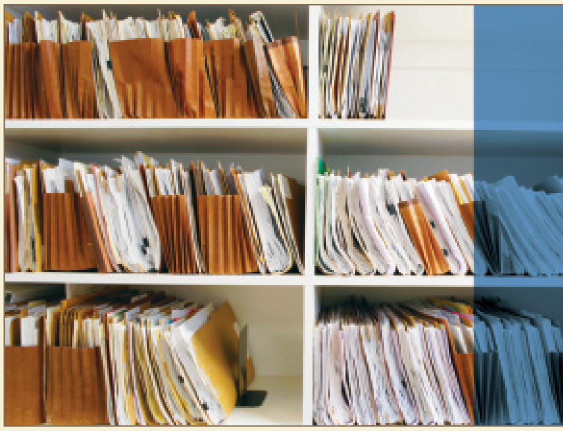
1. All records that support the plan's annual reporting (Form 5500) and disclosure requirements should be retained.
2. All plan related materials and records should be kept for a period of at least six years after the date of filing an ERISA-related return or report.
3. Records should be preserved in a manner and format (electronic or otherwise) that permit ready retrieval.

Ultimately, the responsibility to retain these records lies with the plan administrator (the employer). While it is fairly common for a plan sponsor to contract with outside service providers who may provide certain reports and prepare the plan's Form 5500 filing, the plan administrator is ultimately responsible for retaining adequate records to support the reports and filings. In addition, the Department of Labor (DOL) requires employers to maintain records sufficient to determine the amount of benefits accrued by each plan participant.

Plan documents

ERISA requires that plan administrators retain the following types of plan documents: original signed and dated plan document and all original signed and dated plan amendments (dates and signatures should be easily visible), a copy of the plan's most recent IRS approval letter, and copies of Form 5500.

Form 5500 can follow the six-year retention rule. However, actual plan documents and amendments should be maintained from adoption until after



the plan is terminated. While plans are routinely restated every five or six years, the IRS may, on occasion, go back beyond the prior restatement. It is important to remember, especially when switching vendors, that it's the employer's responsibility to maintain these documents.

Supporting documents

Reports that support these documents should also be retained, including financial reports, Trustees' reports, journals, ledgers, certified audits, investment analyses, balance sheets, income and expense statements, corporate/partnership income-tax returns (to reconcile deductions), documentation supporting

(Continued on page 2)

PENTEGRA RETIREMENT SERVICES

the trust's ownership of the plan's assets, evidence of the plan's fidelity bond (if applicable), and copies of nondiscrimination and coverage test results.

Documentation that supports decisions made by the plan administrator should also be retained, including copies of all corporate/partnership actions and administrative committee actions relating to the plan.

Census and other data

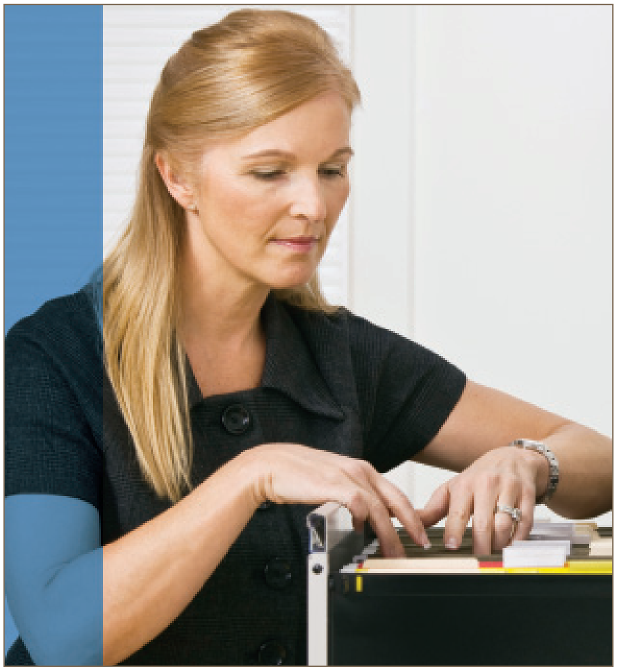
Payroll records used to determine participant eligibility and contributions (including details that support an exclusion from participation) should be retained. Records that establish hours of service data must also be kept to demonstrate the determination of allocations and vesting. **Note:** It is critical that sponsors keep *complete census data*, not just data on those who are eligible to participate.

Communications

Copies of all communications provided to participants and/or beneficiaries should be retained (including Summary Plan Descriptions, Summaries of Material Modifications, and anything else describing the plan). Copies should also be kept of other forms of communication (including notices, disclosures, webinars, slides, and e-mails). Recent plan audits have raised issues regarding whether all eligible employees who chose not to defer actually had the option of participating in their 401(k) plan. Records should be maintained to prove plan participation was made available to all eligible employees.

Participation forms and tax reporting

For plan audit purposes, documentation must be kept to demonstrate that participant transactions are conducted in accordance with plan document provisions. Examples include copies of all documents relating to plan loans, withdrawals, and distributions (including copies of spousal consents) and plan distribution records (including Forms 1099-R).



Duration of storage

As noted above, these records generally should be kept for a period of six years after the date of the filing to which they relate. However, good practice suggests that certain records be kept for the life of the plan — specifically all plan documents dating from the plan's inception. The thicker the paper trail, the easier it will be for the plan to respond to an inquiry from a governmental agency or a request for information from a plan participant.

Records must be kept in such a way that they can be readily retrieved. To the extent that records are lost, stolen, or destroyed before the expiration of the six-year period, the plan administrator will be required to recreate the records, unless doing so would cost an excessive or unreasonable amount.

Electronic storage

According to DOL regulations, electronic media may be used to comply with the record retention requirements — provided the recordkeeping system meets the following requirements:

- There are reasonable controls to ensure the accuracy of the records;
- It is capable of indexing, retaining, preserving, retrieving, and reproducing the electronic records. The retrieval issue becomes more interesting as equipment is updated and upgraded. For example, records retained on microfiche or floppy disks may fail this test if there is no way to read them;
- Records can be readily converted into legible paper copies;
- It is not subject to restrictions that would inappropriately limit the access to the records.

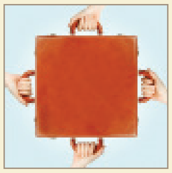
What to do with paper records

Most original paper records may be disposed of after they are transferred to an electronic recordkeeping system, provided the recordkeeping system complies with the above requirements. It is important to note that originals may not be discarded if they have legal significance or inherent value (e.g., notarized documents, insurance contracts, stock certificates, and documents executed under seal).

Archiving

Proper and complete archiving of plan records is essential. Due to advancements in technology, many transactions do not take place on paper, which presents an added challenge to the recordkeeping requirements. Nonetheless, the plan's records should be periodically reviewed, updated, and purged (only to the extent appropriate). This will be time well spent and serves double duty as an overall audit of the plan's operations.

As a practical matter, plan sponsors may want to keep records for a longer period in case of legal actions from participant divorce actions (qualified domestic relations orders, or QDROs) or lawsuits brought by disgruntled employees.



Leased employees

Cost and flexibility are two reasons employers might be interested in using leased employees. Although leased employees are not "common-law" employees of the organization they are performing services for (the "recipient" employer), when certain conditions are met, the recipient employers must treat leased employees as their regular employees for qualified plan coverage purposes.

This article provides a basic overview of the circumstances under which an individual is considered a leased employee for qualified plan purposes.

Leased employee: definition

There are a number of specific rules that must be met for an individual to be considered a leased employee. Specifically, the recipient employer must be paying for the individual's services; the services must be pursuant to an agreement between the recipient employer and a leasing organization; and the individual must perform services on a substantially full-time basis for at least one year.

Substantially full-time basis means that within a 12-month period, the individual completes the *lesser* of:

- 1,500 hours of service or
- 75% of the number of hours that are customarily performed by a regular employee in the specific position. (If this method is used, an individual must be credited with at least 500 hours to be considered substantially full-time, even if 75% of the number of hours customarily performed would be less than 500.)

In addition, services must be performed under the primary direction or control of the recipient employer, and the individual must be a common-law employee of the leasing organization.

Qualified plans and leased employees

Once the above definition has been satisfied, the recipient employer must treat the leased employee as a regular employee for qualified plan purposes and credit the leased employee for all service during the period the individual is a leased employee, including the qualifying one-year period. The leased employee will generally be provided with retirement plan benefits in the recipient employer's plan, although sometimes there are arrangements whereby the recipient employer will pay the leasing employer an amount equal to the benefit provided under the leasing employer's plan.

Limited exception

The Internal Revenue Service (IRS) provides a limited safe harbor that permits a recipient employer to exclude leased employees from plan coverage if:

- Leased employees do not constitute more than 20% of the recipient employer's nonhighly compensated employee work force, *and*
- The leasing organization maintains a nonintegrated money purchase plan that makes a contribution of at least 10% of compensation for the leased employees. Such a plan must provide the leased employees with immediate eligibility and full vesting upon plan entry.

Exclusion by plan provision

Some employers may hesitate to use leased employees because of potential administrative complexities regarding their retirement plan. However, there may be a solution: Employers can consider adding a plan provision that excludes leased employees from participating. This strategy is viable only if the plan can pass coverage testing that includes the leased employees as eligible employees who are excluded from benefiting under the plan.

Covering eligible leased employees

Leased employees must be eligible to benefit from the recipient employer's retirement plan if:

- They meet the definition of leased employee,

- The leasing employer does not provide the requisite money purchase plan, and
- The recipient employer cannot pass coverage with the leased employee exclusion.

Change of employment status

If a leased employee becomes a common-law employee, he or she would immediately become a participant in the employer's plan. If leased employees are excluded by plan provision, and the individual has satisfied the definition of leased employee, the individual would be treated as immediately eligible to participate in the plan, provided that eligibility was satisfied by the service as a leased employee.

If a common-law employee becomes a leased employee, his or her service as a common-law employee would be taken into account for purposes of (1) satisfying the definition of a leased employee and (2) plan eligibility. If the plan is designed to exclude leased employees, the individual would be ineligible to continue participating in the plan. However, his or her service as a leased employee would be credited toward plan vesting. **Note:** The change in status from common-law to leased employee would not be considered a severance for plan purposes and would therefore not be a distributable event.

RECENT developments

Cash balance features added to prototype plans

Until recently, cash balance defined benefit (DB) plans have been available only as individually designed plans. On January 23, 2014, the Internal Revenue Service (IRS) announced that a preapproved DB plan program with cash balance features will be developed. Under Announcement 2014-4, preapproved DB cash balance plans will be available for the next six-year remedial amendment cycle, which is expected to occur sometime between early 2017 and a date two years later in 2019. The next six-year remedial amendment cycle incorporates changes enacted by the Pension Protection Act of 2006 (PPA).

Plan sponsors currently using individually designed cash balance plan documents may want to consider switching to the new preapproved PPA documents when the next preapproved DB plan amendment cycle begins. Although the next six-year amendment cycle may seem far away, current sponsors of individually designed cash balance plans can benefit from these changes sooner. The IRS will permit plan sponsors to stay on their existing documents until the PPA restatement cycle begins. To do so, a cash balance plan sponsor may complete an IRS Form 8905, *Certificate of Intent to Adopt a Pre-approved Plan*. Form 8905 must be completed before the deadline for the next individually designed restatement cycle has passed.

Cycle C cash balance plans, which were originally required to submit a determination letter request prior to January 31, 2014, received an extension until March 31, 2014. This will allow a Cycle C plan sponsor who wants to elect to sponsor a pre-approved plan once the next cycle begins to execute Form 8905. The deadline for Cycle D plans is January 31, 2015, and the Cycle E plan deadline is January 31, 2016.

Announcement 2014-4 also extended the submission deadline for preapproved PPA DB plan documents from January 31, 2014, to February 2, 2015.