

What you need to know about. . .

Failure to File Form 5500s

If you have 100 or more employees participating in any of your health and welfare benefits plans, you could be required to file a Form 5500 with the U.S. Department of Labor (DOL). The 5500 is an annual reporting requirement that provides detailed information to the DOL, employees, and the public about how much you pay in connection with your employee benefits plans and to whom. Depending on your specific benefit plans and their structure, you could be required to disclose premiums paid to carriers, commissions to brokers, consulting fees, and other administrative costs. The forms are also used by the IRS in its enforcement efforts.

5500s are generally due by the end of the seventh month after a plan year ends. For example, if you have a calendar year plan, the 5500 is due by July 31 of the following year; for plan years starting on February 1, the 5500 is due by August 31, and so on.

Who is Required to File a 5500?

Employers that don't know whether they need to file a 5500 should seek the advice of an accountant or attorney. However, in general, you should proceed under the assumption that you **are** required to file unless:

- All of your health/welfare benefits *clearly* have fewer than 100 employees participating at the beginning of the plan year (including former employees on COBRA coverage);
- The plan is a church plan or sponsored by a state or local governmental entity (including cities, towns, villages, and public school districts);
- The plan is a Multiple Employer Welfare Arrangement (MEWA); or
- You're entitled to one of several other, less common exemptions.

What If You Should Have Filed, but Haven't?

Missing 5500s for health and welfare plans is one of the most common compliance mistakes we encounter in taking over a new client's account. Penalties are assessed on a daily basis for late or missing filings and can theoretically run into the millions of dollars, although tens of thousands is more likely.

As for how to move forward once you've discovered a problem, there are a number of options depending on your attitude toward risk. The least risky option (and we would argue the best) is to take advantage of the DOL's Delinquent Filers Voluntary Compliance Program (DFVCP). This program can greatly reduce penalties for employers that voluntarily step forward to correct late or missing 5500s. While the potential penalty amounts are confusing and can vary widely depending on the circumstances, you're likely to be much worse off if the failure to file isn't discovered until you're audited.

Two less desirable options include: 1) filing a 5500 for your current plan year using the regular filing process and hoping the DOL doesn't notice that previous years are missing; or 2) holding off on filing until you're caught, running the risk of much higher penalties in the long run.

Final Thoughts

We have walked many clients through the DFVCP process in the past and are available to help in this regard. If you think you might have mistakenly failed to file 5500s on time (or at all), contact your benefits advisor.



The Miller Group's compliance director Julie Athey, is a licensed attorney with many years of experience in interpreting state and federal employment laws such as ERISA, COBRA, the ACA, FMLA and ADA. She frequently writes and speaks on legal and regulatory topics and has earned a reputation for being able to simplify complex concepts. If you have questions, feel free to contact Julie at juliea@millercares.com.