

## Fox Rothschild Podcast

### Legal Trends in Employee Benefits Administration

#### *Featuring Seth Corbin and Sheldon Miles*

***Narrator:** We're talking today on FoxCast with partner Seth Corbin and associate Sheldon Miles in Pittsburgh. Our topic? Legal trends in the field of employee benefits administration. Seth's practice encompasses a broad range of corporate law, employee pension and welfare benefits as well as executive compensation. Sheldon assists companies with implementing and maintaining their employer-sponsored retirement and health plans and also non-qualified deferred compensation programs. Seth, Sheldon, good morning.*

**Corbin:** Good morning.

**Miles:** Great to be here.

***Narrator:** Seth, Sheldon, you and your colleagues recently presented a national Fox webinar with updates on employee benefit law issues.*

**Corbin:** Yes, it was a good virtual event discussing a number of very important concerns in the employee benefits world. Sheldon and I started with the issue of making plan corrections under the IRS's Employee Plans Compliance Resolution System, or EPCRS for short. We also covered employee benefit plan document retention requirements.

**Miles:** Additionally, some of our colleagues addressed mental health parity updates and plan sponsor COVID-19 FAQs. The final portion of the event involved the Consolidated Appropriations Act and transparency in coverage rules, recent guidance on COBRA election and premium payment deadlines under COVID-19 outbreak period extension rules.

***Narrator:** So, Seth, Sheldon, let's start right from the top. What do employers need to know about making plan corrections under EPCRS?*

**Corbin:** Sure. The IRS operates EPCRS for sponsors of qualified plans, such as pension and 401(k) plans, to correct certain plan failures. By correcting plan failures through EPCRS, an employer can prevent having its tax-favorable plan disqualified by the IRS and pay either no fee or a reduced fee. Since establishing EPCRS, the IRS has modified and amended this program on numerous occasions. The most recent update to EPCRS is taking place this year. EPCRS is generally made up of three separate programs: Self-Correction Program; the Voluntary Correction Program; and the Audit Closing Agreement Program.

**Miles:** The first types of failures are operational, such as excluding otherwise eligible employees from participating in an employer’s plan. A second would be documentary, failing to amend a plan’s governing document to conform to changes under the Internal Revenue Code. Another might be demographic, failing to pass coverage and/or nondiscrimination testing. A fourth could be employer eligibility, such as a government entity adopting a 401(k) plan.

*Narrator: Seth, can you give us an overview of self-correction programs?*

**Corbin:** When utilizing the self-correction program, a plan correction does not require a fee or approval from the IRS. Employers can correct insignificant operational failures at any time. However, significant operational failures – based on a multitude of factors – must be corrected within three years from the date of the failure. Demographic and employer eligibility failures are not eligible for correction under the Self-Correction Program. Additionally, it should be noted that plans that are under IRS audit cannot also use the self-correction approach.

*Narrator: Sheldon, and then there’s the concept of a voluntary correction program.*

**Miles:** Yes, a voluntary correction must be submitted to the IRS for formal approval in the form of a Compliance Statement. An employer pays a fee based on the plan’s net assets. For plans with \$10 million and more in assets, the fee is currently \$3,500. VCP submissions are filed electronically and, once the submission is reviewed and finalized with the IRS, employers will receive a Compliance Statement approving the correction. As with self-correction, plans that are under IRS audit cannot use the voluntary correction program approach.

*Narrator: Seth, what about the Audit Closing Agreement Program, or “Audit CAP”?*

**Corbin:** The Audit CAP is used to correct plan failures discovered by the IRS during an IRS audit. A plan sponsor will make the correction, enter into a closing agreement with the IRS and pay sanctions, which generally are greater than VCP fees but less severe than the financial consequences of full-blown plan disqualification.

*Narrator: Seth, Sheldon, please tell our listeners about recent changes made to EPCRS.*

**Corbin:** Yes, the time period has been extended for correcting significant operational failures under the Self Correction Program by one year. As previously noted, the self-correcting period now extends three years instead of two. If a plan failure involves less than \$250, it does not need to be corrected. Previously, this *de minimis* amount was \$150. Additionally, effective January 1, 2022, the IRS will no longer accept anonymous VCP submissions, which had previously been available to allow plan sponsors to anonymously test the waters with the IRS regarding a proposed correction.

**Miles:** The safe harbor has been extended for 401(k) plans with automatic enrollment features. Previously it was supposed to sunset on December 31, 2020. It’s now easier to make corrections

by adopting a retroactive plan amendment under the Self Correction Program. Defined benefit plans have more options for correcting overpayments made to participants.

***Narrator:** So, let's shift to a discussion of benefit plan document retention requirements. Why is it so important for an employer to retain its plan documents?*

**Miles:** Well, it's required both under ERISA and the Code. Having these records is pivotal for defending claims for breach of fiduciary duties. Any documents used to support or deny a participant's claim for benefits must be retained. They must be kept in the event a plan is audited by the DOL or the IRS.

**Corbin:** Employers must maintain records with respect to each of its employees to determine the benefits due, or which may become due, to the employee. Proposed DOL regulations suggest that records must be retained as long as the possibility exists that such records might be relevant to a participant's benefit determination, which could really mean indefinitely.

**Miles:** The records cover a variety of plan documents, summary plan descriptions, amendments and a summary of material modifications. Others can include IRS determination letters, the trust agreement, participant account records and actuarial accrued benefit records. They even can include a plan's census data, documents relating to loans, withdrawals, rollovers and distributions, and beneficiary designation forms and spousal waivers.

***Narrator:** Is that all of it?*

**Miles:** No, actually there's more. Any notices furnished to plan participants – committee minutes and resolutions, research about changes in plan design and the hiring of service providers, and communications and documents submitted by a participant and/or beneficiary during a plan's appeals process.

**Corbin:** Further, under ERISA, every employer is required to file an annual return, known as Form 5500. Employers must maintain a copy of the report and any data from which information disclosed on the report is derived. Records must be available for examination for a period of no less than six years after the annual return is filed. The following documents should be maintained in connection with this requirement: copies of Form 5500, including all schedules and attachments, nondiscrimination and coverage testing, required employee communications, financial reports and supporting documentation, agreements regarding a plan's fidelity bond and plan sponsor income tax returns.

***Narrator:** It's a bit overwhelming.*

**Corbin:** Agreed. ERISA also has a number of rules covering using electronic media for maintaining documents – agreements with third parties, recordkeeping for tax purposes and group health plan compliance under HIPAA.

***Narrator:** What about document retention and cybersecurity?*

**Corbin:** The DOL recently emphasized the importance of hiring service providers that have strong cybersecurity practices. As a reminder, fiduciaries are responsible for hiring and monitoring service providers, and service providers often maintain the plan's records.

**Miles:** There are a host of tips the Department has provided for use when hiring a service provider. We can furnish these to anyone who might be interested.

***Narrator:** Well, unfortunately, we're about out of time for today. There's just so much more we could cover. Seth, Sheldon, thank you for your time today. Listeners, to confidentially discuss how your organization might be impacted by these issues, or to receive a copy of their recent webinar PowerPoint, please contact Seth Corbin in Pittsburgh at 412. 394.5530 or at scorbin – that's S-C-O-R-B-I-N – at foxrothschild.com. Or you may contact Sheldon Miles at 412.394.5590 or at smiles – that's S-M-I-L-E-S – at foxrothschild.com.*

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