2023 YEAR–END TAX PLANNING GUIDE FOR BUSINESSES

Global Employer Services

FustCharles

INTRODUCTION

FustCharles has had a very eventful 2023. We moved our headquarters from Widewaters Parkway to Merchants Commons in downtown Syracuse, embarked on a major rebranding, and opened a second location in Rochester. It's been an exceptional year and we're excited to continue our commitment to talent development, innovation and teamwork to provide our clients with a best-in-class service experience.

As of the date of this publication, 2023 has been a relatively quiet year in tax legislation. The IRS has been busy issuing guidance for both the 2022 tax legislative changes and pieces of the Tax Cuts & Jobs Act (TCJA). Given the upcoming US presidential election, there may be continued stalemate in Congress or the potential for more robust legislative changes – only time will tell.

FustCharles Tax professionals grasp the intricate connections between evolving laws, economic dynamics, and the tax implications of various business decisions and are well-positioned to serve as strategic advisors, steering companies toward success. Tax planning remains a vital aspect for businesses seeking to optimize cash flow by managing their long-term tax obligations. Our 2023 Year-End Tax Guide delves into effective tax strategies, taking into account recent administrative guidance and potential legislative changes that are currently under review. For further information and assistance, please reach out to a member of our expert tax team.

Unless explicitly stated otherwise, the information provided in this guide is based on existing tax laws and policies as of the publication date, and it may be subject to adjustments in response to future legislative or tax policy changes.

Global Employer Services

Utilizing Qualified Retirement Plan Enhancements to Improve Recruitment, Retention, and Employee Satisfaction

The SECURE 2.0 ACT of 2020 introduced over 90 changes to the federal rules governing workplace retirement plans. Many of the changes introduced by SECURE 2.0 are beneficial to employees and up to the discretion of the plan sponsor. Adopting some of these employee-favorable provisions might reassure employees that they can access their savings if needed before retirement, leading to overall increased employee savings and increased employee satisfaction.

Further guidance on many of the new provisions is needed, but every employer, whether for-profit or tax-exempt, that currently maintains a qualified retirement plan or is considering a future plan should evaluate their compliance with mandatory provisions and the cost benefit of adopting some of the many employee-friendly optional provisions.

After the provisions to be adopted are narrowed down, any necessary operational changes that require systems or processes updates can be identified. Written amendments to the plan document to reflect the implemented changes are not required until the end of the plan year beginning in 2025. Government employers have until the end of their 2027 plan year to amend the plan document.

Changes effective December 29, 2022

- SECURE 2.0 allows de minimis financial benefits, such as low-value gift cards, as incentives to encourage employees to elect to contribute to 401(k) and 403(b) plan. Prior to this change such incentives violated the IRS's "contingent benefit rule."
- Employers may allow plan participants to designate matching and nonelective contributions as Roth contributions.
- Plans or IRAs may allow affected participants additional access to retirement funds in the event of federally declared disasters that occur on or after January 26, 2021, by allowing penalty-free distributions up to $22,000 per disaster to affected participants, while spreading the income tax liability over three years if not repaid prior to the taxable date. Plans can also allow increased participant loans of $100,000 instead of the regular $50,000 loan limit for disasters that occur on or after January 26, 2022.
- Plan sponsors can rely on employees' self-certification that the employee has experienced a deemed hardship for purposes of taking a hardship withdrawal.
- Cash balance plans with variable interest crediting rates may use a projected "reasonable" interest crediting rate that does not exceed 6%, thereby allowing credits that increase benefits for older, longer-service workers without risking failing the anti-backloading rules that otherwise may create problems for cash balance plans.
- The act allows 403(b) plans to invest in Collective Investment Trusts (CITs) in addition to mutual funds and/or annuity contracts.

- Employers with 100 or fewer employees earning at least $5,000 in annual compensation can receive a general tax credit of up to $500 for three years, if they make military spouses (1) eligible for defined contribution plan participation within two months of hire; (2) upon plan eligibility, are eligible for any match or non-elective contribution that they would have been otherwise eligible for at two years of service; and (3) 100% vested in employer contributions. The credit is equal to $200 per participating non-highly compensated military spouse, plus 100% of employer contributions made to the military spouse, up to $300. The credit is available for the year the military spouse is hired and the two succeeding taxable years. Employers may rely on the employee's certification that they are an eligible military spouse.
- Small employers are eligible for a plan start-up credit, effective for taxable years beginning after December 31, 2022. The start-up credit for adopting a workplace retirement plan increases from 50% to 100% of administrative costs for small employers with up to 50 employees. The credit remains 50% for employers with 51-100 employees. Employers with a defined contribution plan may also receive an additional credit based on the amount of employer contributions of up to $1,000 per employee. This additional credit phases out over five years for employers with 51-100 employees. The start-up credits are available for three years to employers that join an existing MEP, regardless of how long the plan has been in existence. The MEP rule is retroactively effective for taxable years beginning after December 31, 2019; therefore, plans that joined an MEP in 2020, 2021, or 2022 can file retroactively for this credit.
- SIMPLE and Simplified Employee Pensions (SEPs) can accept Roth contributions effective for taxable years beginning after December 31, 2022. In addition, employers can offer employees the ability to treat employee and employer SEP contributions as Roth contributions (in whole or in part).
- Employers of domestic employees (nannies, housekeepers, etc.) can provide retirement benefits for those employees under a SEP.

Changes taking effect in 2024

- Employers may treat an employee's qualified student loan payments as employee contributions to a 401(k) plan, 403(b) plan, governmental 457(b) plan, or SIMPLE IRA that is entitled to an employer matching contribution. For nondiscrimination testing of elective contributions, plans may separately test the employees who receive matching contributions on student loan repayments.
- Defined contribution plans may offer short-term emergency savings accounts to non-highly compensated employees. These accounts will be funded with employee after-tax Roth payroll deductions up to $2,500 (indexed for inflation). Employers may automatically enroll employees into these accounts at no more than 3% of their salary. Contributions are eligible to receive matching contributions. Participants can make up to one withdrawal per month. When employees terminate employment, they may take their emergency savings accounts

as cash or roll them over into their new employer's Roth 401(k) plan (if any) or into a Roth IRA.

- Employers can retroactively amend a workplace retirement plan to increase participants' benefits for the prior plan year, so long as the amendment is adopted no later than the extended due date of the employer's federal income tax return for such prior year.
- The 10% penalty on early withdrawals before age 59 1/2 is waived for certain emergency expenses based on a participant's self-certification that they meet the necessary criteria.
- Employers that do not sponsor a workplace retirement plan may offer a new, safe harbor "starter" deferral-only plan that automatically enrolls employees at 3% to 15% of their compensation. The annual contribution limit is the same as for IRAs ($6,500, with an additional $1,000 for catch up contributions for employees who are age 50 or older. Starter plans are exempt from most nondiscrimination testing rules. This change is effective for plan years beginning after December 31, 2023.
- Employers may replace a SIMPLE IRA during the plan year with a SIMPLE 401(k) that requires mandatory employer contributions. Also, employers with SIMPLE plans may make additional employer contributions above the existing 2% of compensation or 3% of employee elective deferrals requirement. Additional employer contributions must be uniformly made and cannot exceed the lesser of 10% of compensation or $5,000 (indexed for inflation). In addition, the annual deferral limit and the catch-up contribution at age 50 is increased by 10% in the case of an employer with no more than 25 employees. An employer with 26 to 100 employees would be permitted to provide higher deferral limits, but only if the employer either provides a 4% matching contribution or a 3% employer contribution.

Changes taking effect in 2025

- A provision designed to increase retirement savings will be effective for 401(k) and 403(b) plans adopted after December 29, 2022, requiring employees to be automatically enrolled for minimum elective deferral contributions. However, participants can opt out of automatic enrollment or automatic escalation.
- Effective December 29, 2025, retirement plans can distribute up to $2,500 per year to pay for certain long-term care insurance premiums. Such distributions are exempt from the 10% early withdrawal penalty that might otherwise apply.

Qualified Plan Errors? Not a Problem.

The IRS has green-lighted the immediate use of most – but not all – expanded self-corrections for compliance failures involving tax-qualified retirement plans. This guidance – set out in IRS Notice 2023-43 – came out before an official update of the Employee Plans Compliance Resolution System (EPCRS).

IRS Notice 2023-43 set out a dozen questions and answers explaining what taxpayers can and cannot do until the IRS formally updates EPCRS. The notice provided taxpayers certainty and generally made self-correction easier and less expensive.

Which errors can be corrected and when?

SECURE 2.0 gives plans and IRAs an indefinite period to correct all "eligible inadvertent failures." Previously, significant qualification failures had to be corrected within three years after the failure occurred, although insignificant errors generally could be corrected at any time.

Even plans under IRS examination can self-correct if the taxpayer can demonstrate actions that demonstrate a specific commitment to self-correct. Whether such actions have been taken depends on facts and circumstances, but generally include proof that the plan is actively pursuing correction of the failure. The notice states that the mere completion of an annual compliance audit or a general statement of intent to correct failures is not sufficient. This is a different standard than that provided in Rev. Proc. 2021-30, which is intended to eliminate arguments over who found the error first.

The notice requires that any self-correction be completed "within a reasonable period of time after the failure was identified." Correcting failures within 18 months after discovery is deemed to be reasonable, except for employer eligibility failures. Those failures must be corrected no later than six months after the failure was discovered, but only if the employer stops all contributions to the plan as soon as practicable after discovering the failure.

Importantly, the notice confirms that qualification failures that happened before SECURE 2.0 was enacted on December 29, 2022, can be self-corrected under the expanded SECURE 2.0 relief. For corrections that were already made based on the expanded SECURE 2.0 relief from December 29, 2022 (the date SECURE 2.0 was enacted) through May 25, 2023 (the date the notice was released), the IRS will allow taxpayers to use a good faith, reasonable interpretation of the new SECURE 2.0 relief. Compliance with the notice is deemed to be reasonable, good faith compliance.

What is an eligible inadvertent failure?

An eligible inadvertent failure is a plan operational, document, or demographic failure that violates the IRC qualification requirements. The failure occurred despite the plan having regular practices and procedures for plan oversight and administration that satisfy existing EPCRS standards. It does not include any failure that is egregious, diverts or misuses plan assets, or directly or indirectly relates to an abusive tax avoidance transaction.

The notice lists failures that cannot be self-corrected until the IRS updates EPCRS, including:

- Failure to initially adopt a written plan;
- Correcting an operational failure by plan amendment that conforms the plan document to the plan's prior operations in a manner that is less favorable for a participant or beneficiary than the original plan terms;
- Significant failures in a terminated plan;
- Certain demographic failures;

- Failures in orphan (abandoned) plans;
- Employee stock ownership plan (ESOP) failures involving IRC Section 409;
- Excess contributions to a SEP or SIMPLE IRA that allows the excess to remain in the plan; and
- Failures in SEPs or SIMPLE IRAs that do not use the IRS model plan documents and even for model plans when excess contributions remain in the IRA account.

The notice immediately eliminated certain long-standing EPCRS requirements for self-correcting eligible inadvertent failures:

- A favorable IRS approval letter is no longer needed to use EPCRS;
- Plan loan failures can now be self-corrected without an IRS filing; and
- Significant failures, if they were inadvertent, can be self-corrected at any time (instead of only within three years after the plan year in which the error occurred).

A plan sponsor is not required to self-correct and may continue to submit VCP applications to the IRS even for failures that are eligible for self-correction.

Is a Reorganization or Shareholder Buyout on the Horizon?

Shareholders should continue to recognize the usefulness of employee stock ownership plans (ESOPs) despite some issues noted in a recent IRS press release.

For decades, ESOPs have evolved into a well-regulated ownership transition tool that provides significant tax advantages to the selling business owner, the company sponsoring the ESOP, and its employees. For business owners, the Internal Revenue Code enables certain shareholders (depending on entity tax structure) the opportunity to defer capital gains associated with stock sold directly to the ESOP. Further, if a company is an S corporation with an ESOP trust owner, the ESOP trust will be allocated its pro rata share of income/loss as a shareholder. Because an ESOP trust is exempt from federal (and most state) income taxes, the ESOP does not pay taxes on that allocation. Thus, S corporations that are 100% owned by an ESOP trust operate with significant tax and cash flow advantages. Lastly, employees participate in the company's equity growth through a tax-deferred retirement vehicle, with no out-of-pocket cost to the employees.

Research continues to show that ESOPs improve retirement security and economic well-being. However, the IRS issued a press release on August 9, 2023, expressing concern that certain ESOP versions were being aggressively marketed that will not pass muster because they appear to shelter taxable income while not providing true, broad-based ownership to employees.

The IRS specifically expressed concern about situations where a business creates a "management" S corporation, 100% owned by an ESOP, that subsequently lends the owners of its lower-tier business affiliates (who were the original owners of the S corporation before the ESOP owned 100% of the S corporation) a significant amount of the S corporation's business income. Under the arrangement, such loans are never intended to be repaid, thus transferring the S corporation's income to a few highly paid individuals. In turn, those uncollectable loans reduce the value of the S corporation stock held by the ESOP, because cash is lent out and potentially worthless loans remain.

In addition to the "management" S corporation ESOP scheme, the IRS identified three other ESOP issues that are part of its current enforcement and compliance efforts:

Improper Valuation of Employer Stock. The valuation of employer stock has been an issue for the ESOP industry for many years because the Employee Retirement Income Security Act of 1974, as amended (ERISA) requires that ESOPs pay no more than "adequate consideration" (i.e., fair market value) for employer stock. The SECURE 2.0 Act, which became law on December 29, 2022, directs the U.S. Department of Labor, Employee Benefits Security Administration (EBSA) to provide guidance on the definition of "adequate consideration" for ESOPs. As a best practice, any company considering an ESOP should engage an independent trustee to act as an ERISA fiduciary with respect to the ESOP participants. This independent trustee should rely on a qualified independent appraiser, as defined under ERISA rules, to determine the fair market value of the stock being sold to the ESOP.

Prohibited Allocation of Shares to Disqualified Persons. Prohibited allocations of employer stock to disqualified persons is an issue arising from IRC Section 409(p), an anti-abuse provision enacted to promote broad-based ownership by rank-and-file employees. ESOP transactions should be properly screened by those qualified to assess IRC Section 409(p) allocation issues. When a selling shareholder, their family members, or a highly compensated management team seems likely to receive a disproportionate allocation of company equity in the ESOP, there may be a compliance issue that should be addressed on the front end before the allocation is made. Companies should do their diligence, in consultation with qualified, reputable advisors, so that prohibited allocations are avoided. This due diligence involves detailed compliance testing before any ESOP transaction and continued monitoring post-transaction.

Prohibited Transaction Rules for ESOP Loans. Under IRC Section 4975(c)(1)(B), prohibited transactions include any direct or indirect sale, exchange, lending of money or extension of credit, or various other transactions between a qualified plan and a "disqualified person" (a person with certain relationships to the plan). Due to the nature of an ESOP transaction and the parties involved, in the absence of an exception, an ESOP transaction would inherently be defined as a prohibited transaction.

However, there is a statutory prohibited transaction exemption for stock acquisition loans made to ESOPs under IRC Section 4975(d)(3), as long as the loan is (1) primarily for the benefit of the plan participants, (2) at a reasonable interest rate, and (3) any collateral given to the disqualified person selling the shares consists solely of qualifying employer securities. Further, ERISA Section 408(e) provides a separate statutory exemption relating to the acquisition or sale by the plan of qualifying employer securities, provided that the acquisition or sale by the plan is (1) for adequate consideration (or for marketable securities, at a price no less favorable to the plan than the price determined under ERISA Section 407(e)(1)), (2) no commission is charged on the sale, and (3) the plan is an eligible account plan.

Planning

It is important for any company and business owner considering an ESOP structure to engage a qualified ESOP advisor with the experience necessary to navigate the complex regulatory and tax requirements associated with ESOP transactions. A prospective or current ESOP company that receives proper advice from qualified professionals throughout the plan implementation, transaction process, and the ongoing administration of the plan will benefit from the tax advantages ESOPs can provide.

Be Aware that the Deduction for Accrued Deferred Compensation Could be in Jeopardy

The U.S. Court of Appeals for the Seventh Circuit recently affirmed a 2022 Tax Court decision, concluding that an accrual basis partnership that sold substantially all its assets in 2012 cannot take an ordinary tax deduction in the same year for the net present value of a non-qualified deferred compensation (NQDC) liability that was assumed by the buyer, even when a deemed payment was made to the buyer through a price reduction. The seller calculated the net present value of the assumed NQDC liability to be $10.7 million and included that amount in its reported capital gain from the sale of assets, in addition to deducting the $10.7 million as an ordinary business expense to incentivize the buyer to assume the liability.

The case -- *Hoops, LP v. Commissioner*, 7th Cir. No. 22-2012 (Aug. 9, 2023) -- involved the sale of the Memphis Grizzlies NBA professional basketball team.

This case upsets what appears to be a common interpretation among deal advisors that a purchase price adjustment results in a deduction for the seller when the buyer assumes the seller's NQDC liability as part of a sale of a business.

Taxpayer's Argument

The seller viewed the $10.7 million reduction in sales price as a deemed payment to the buyer as compensation for assuming the NQDC obligation. The seller argued that the deduction was for the payment "from one company to another company for the second company to assume the first company's liability" and was not an NQDC payment. As an expense of the sale, the $10.7 million would be immediately deductible as an ordinary and necessary business expense under IRC Section 162(a) and Treas. Reg. §1.461-4(d)(5)(i) without the constraints of Section 404(a)(5), which governs deductions of NQDC.

The seller also urged the court to take a practical approach that allowed the 2012 deduction considering it might not ever be able to claim the deduction under the Section 404(a)(5) NQDC rules if the buyer failed to pay the benefits to the employees or if the seller no longer existed when the payment was made.

Lastly, if a deduction was not allowed upon closing, seller requested that its capital gain be reduced by the $10.7 million sales price reduction.

IRS's and Court's View

Notwithstanding the fact that Treas. Reg. §1.461-4(d)(5)(i) sometimes accelerates a deduction in connection with the sale of a taxpayer's trade or business, it does not apply when a more specific provision of the law dictates the tax treatment of the transaction. See Treas. Reg. §1.461-1(a)(2)(i).

The Tax Court noted that Section 461 and its related regulations direct accrual method taxpayers to look *first* to other relevant Code sections before applying Section 461's timing provisions. Section 404(a)(5) provides that an accrual basis taxpayer (such as the seller) can deduct deferred compensation only in the tax year when it pays the employees or contributes to certain tax-qualified retirement plans. Because the seller did neither but provided cash through the purchase price adjustment to the buyer to pay the future compensation, the seller's deduction was untimely.

The IRS, the Tax Court, and the Seventh Circuit all disagreed with the seller's position that the cash concession to the buyer should not be governed by the NQDC rules, noting that if the sale had never happened, Section 404(a)(5) would have prevented the seller from claiming the deduction in 2012 because no payments had been made to a qualified retirement plan or to the employees. The Seventh Circuit noted that "[i]n this way, Section 404(a)(5) creates what we might call a 'matching rule' between employer and employee, where Congress intended for employers to deduct deferred compensation expenses and employees to report income in the same tax year."

That determination was based on interpreting the Tax Code to require that explicit statutory provisions – i.e., Section 404(a)(5)'s "specific regulation of non-qualified deferred compensation plans must prevail over [Treas. Reg. Section] 1.461-4(d)(5)(i)'s broader treatment of assumed liabilities in connection with the sale of businesses more generally." The Seventh Circuit noted that the liability assumed by the buyer wasn't just any liability, but rather was "a liability for deferred compensation based on services already rendered" by two employees in prior years. Thus, the detailed rule of Section 404(a)(5) applies to that liability.

In other words, the court concluded, "Section 404(a)(5) leaves us with a firm conviction of Congress's intent to treat the deductibility of deferred-compensation salary plans differently from ordinary service expenses – and that this special treatment prevails over any general provisions otherwise applicable to liabilities assumed in asset sales."

The Tax Court reached a similar conclusion in *Jacobs v. Commissioner*, 45 T.C. 133, 134-35 (1965), finding that the nature of the underlying obligation survives the sale transaction. Therefore, Section 404(a)(5) continues to apply to the $10.7 million and provides a clear rule that bars the seller from claiming a 2012 deduction because the seller did not pay the employees the NQDC during that year.

In the *Hoops* case, Section 404(a)(5) precludes deducting the deferred compensation liabilities until the time payment is made to the employees.

Additionally, Treas. Reg. §1.461-4(d)(5)(i) only accelerates a deduction to which the taxpayer would have been entitled "but for the economic performance requirement." Here, economic performance was not the requirement that prevented Hoops from claiming a deduction in the year of sale, but rather it was the Section 404(a)(5) requirements.

The court also rejected taxpayer's request that a practical approach be taken and noted that "parties can and do account for tax risk as an economic matter by negotiating contractual provisions to minimize and compensate for such financial contingencies."

Finally, the court did not think it appropriate to reduce the sales proceeds by $10.7 million when calculating the capital gain from the sale of assets because of the buyer's assumption of liability in that amount.

The case illustrates the notion that when both Section 404(a)(5) and Section 461 apply to a set of facts to determine the deduction timing rules, Section 404(a)(5) must be applied first. Even if the seller's future obligation is "settled" upon closing by a payment to the buyer or a sales price reduction, that payment does not satisfy the Section 404(a)(5) requirements for deductibility until the amounts are paid to or are reportable by the employees. As the *Hoops* case shows, the commonly used purchase price adjustment does not work to accelerate the deduction for NQDC to the date of closing.

Often a seller like Hoops that has sold substantially all its assets ceases to exist soon after the transaction, and therefore has no opportunity to benefit from the future tax deduction created by payment to the employees. Thus, the deferred compensation deduction may simply be lost because of the deal, because the seller may never realize the deferred compensation deduction at all and the buyer is not entitled to the deduction because only the service recipient is entitled to the compensation deduction, and not by virtue of paying a liability assumed from the seller.

While the income tax deduction would be cleaned up by having the seller pay its compensation liability before the asset sale, complicated rules under Section 409A that govern deferred compensation arrangements prohibited the acceleration of agreed upon NQDC payments except in limited circumstances. Violations of Section 409A could trigger excise tax of 20% plus additional interest imposed on the employees (who, in turn, typically would sue the employer).

If the seller cannot pay its compensation liability without violating Section 409A before the asset sale and take the deduction, then the buyer, who cannot benefit from the deduction, when payment is made in the future might decrease the offered purchase price.

Protect Against Late Filing Fees by Preparing for Upcoming Expanded Electronic Filing Requirement for 2023 Tax and Information Returns

The IRS finalized regulations in 2023 significantly expanding mandatory electronic filing of tax and information returns that require almost all returns filed on or after January 1, 2024, to be submitted to the IRS electronically instead of on paper.

Under the new rules, filers of 10 or more returns of any type for a calendar year generally will need to file electronically with the IRS. Previously, electronic filing was required if the filing was more than 250 returns of the same type for a calendar year. The new rules broadly apply to all types of returns, but the most urgent are common workplace IRS information forms, such as Form W-2 and 1099 filings, and employee benefit plan filings that are due early in 2024.

For many employers, simply doing the "same as last year" will not work.

Who is affected? Practically all filers with the IRS of 10 or more information returns when counting any type, such as Forms W-2, Forms 1099, Affordable Care Act Forms 1094 and 1095, and Form 3921 (for incentive stock options) and other disclosure documents are impacted by this change this year – that is, for 2023 returns that will be filed in 2024. Even workplace retirement plans may need to file Form 1099-Rs (for benefit payments) and other forms electronically with the IRS starting in 2024, for the 2023 plan or calendar year.

Which returns are affected? In addition to information returns, the new rules cover a broad variety of returns, including partnership returns, corporate income tax returns, unrelated business income tax returns, withholding tax returns for U.S.-source income of foreign persons, registration statements, disclosure statements, notifications, actuarial reports and certain excise tax returns.

How to count to 10? A significant change introduced by the new regulations is that the 10-return threshold for mandatory electronic filing is determined on the aggregate number of different types of forms and returns. The aggregation rules are confusing because the filings included in the count change depending on which form the determination is made. Also, some filers must be aggregated with all entities within its controlled or affiliated service group to determine if 10 or more returns are being filed for the tax year. For instance, Form 5500 employee benefit plan filers (but not Form 8955-SSA employee benefit plan filers) must count the filings of the employer who is the "plan sponsor" and other entities in the employer's controlled and affiliated service group.

What can taxpayers do? Any payers that currently file any returns on paper should consult with their tax advisor to determine if the new electronic filing requirements apply to them based on the number of returns they anticipate filing in 2024 for tax year 2023.

For the first time, filers must pay particular attention to the total number of returns across all return types, because the new electronic filing threshold is determined based on the aggregate total, not the number of returns per return type. This might require coordination between different departments within an organization and immediate consultation with the IT department and/or software provider to ensure there is adequate time to implement technology solutions or software upgrades before the 2024 filing deadline.

The IRS's new -- and free -- online portal for filing these returns electronically, Information Returns Intake System (IRIS), is especially helpful for small filers dealing with electronic filing for the first time. According to the IRS, IRIS is secure, accurate, and does not require any special software. This free service is available to filers of any size.

Forms 1094, 1095, 1099, and 5498. Forms 1094 and 1095 series (Affordable Care Act coverage reporting), Form 1099 series (including 1099-R for retirement plan benefit payments) and Form 5498 Series (for IRA contributions) required to be filed after December 31, 2023, must be filed electronically if the filer is required to file 10 or more "specified information returns" during the calendar year that includes the first day of the plan year.

Counting Rules for Each Form. When determining whether a filer for a retirement plan's Forms 1099-R must file those forms electronically, the filer would count only its "specified information returns" (like

Forms W-2, 1099 series, 1094 series, and 1095 series). The requirement to include filings by entities in the sponsor's controlled or affiliated group applies only to electronic filing of the plan's Form 5500.

What about corrected returns? Generally, if an original return is required to be filed electronically, any corrected return corresponding to that original return must also be filed electronically. If an original return is permitted to be filed on paper and is filed on paper, any corrected return corresponding to that original return must be filed on paper.

Are there any waivers or exemptions? Filers that are required to file fewer than 10 returns during the calendar year when counting all types may use IRS paper forms, but only if the paper form is machine-readable.

In cases of undue hardship, the IRS may waive the mandatory electronic filing requirement. The main factor in determining hardship is the amount, if any, by which the cost of electronic filing exceeds the cost of paper filing. Religious waivers will also be considered. Waiver requests must be made in accordance with applicable IRS revenue procedures and must specify the type of filing and the period to which it applies. Electronic filing is also generally waived if the IRS's system does not support it for a particular form or situation.

What are the penalties for noncompliance? A failure to file in the required manner (for example, electronically or on machine-readable paper forms) is considered a failure to file. The penalties differ based on the type of return. For information returns, such as Forms W-2 and Form 1099 series, the penalty under Internal Revenue Code Section 6721 would apply, which is up to $310 per information return (for 2023 information returns required to be filed in 2024) with an annual maximum penalty of $3,783,000 ($1,891,500 for small businesses with annual gross receipts of no more than $5 million). Penalty amounts are indexed and change annually.

Update Remote Work Policies to Balance Current Employee Demand and Risk Environment

Many employees now expect the flexibility allowed during the COVID-19 pandemic to continue. Given the high demand for talent and the need to remain competitive, businesses may be willing to stretch historical policies to attract and retain resources. Setting precedent with policy exceptions not fully vetted can quickly create issues that are not only difficult to correct but can also be costly for the company and employee.

Allowing even one employee to work remotely for a short period of time can come with a high price tag, including the need to perform a permanent establishment (PE) review to determine if corporate nexus is established by having an employee in their desired location. If a PE is established, the requirements likely waterfall into registration, reporting of compensation, and tax withholding/remittance issues.

The exceptions that were made under the COVID emergency with the expectation that they would be temporary should be thoroughly reevaluated now before being permanently adopted. Guidelines should be put in place to help the organization understand potential obligations prior to approving employees' requests to change their work location to, for example, work from their personal residence or from a remote location different from the employer's geographic location.

The risks and complexities that come with remote work arrangements aren't new, but the monetary cost is magnified due to the number of employees taking advantage of this flexibility. Tax authorities are under pressure to find revenue, and remote workers provide an opportunity to identify potential tax exposures.

Operating under the radar is not a prudent approach for businesses. A proactive approach that develops a remote worker policy that mitigates risk and aligns with overall business objectives is advised.

How to Create a Remote Worker Policy

Step 1: Build a team and identify the stakeholders.

The first step in developing a remote worker policy is to identify all parties that will need to be involved. This includes key leadership, who will need to buy into the policy and understand the complexities and potential exposures. It also includes those who will develop the plan and be knowledgeable to address and own several facets of mobility -- human resources, information technology/security, legal, and tax departments.

Step 2: Define the objectives and parameters of the policy.

After the team is developed, the next step is to bring everyone together and brainstorm ideas of what they want to accomplish, keeping in mind the importance of in-person work to develop relationships and a culture including tight-knit teams balanced by the benefit of removing the geographic limitation on your eligible candidate pool.

The wish list will likely need to be narrowed to create a framework for the policy because not everything can be accomplished. While it's possible to have more than one policy for different employee populations, it's important that there be only one version to avoid the company being called to task for internal inequities. This policy will need to evolve to meet the changing needs of the organization and its workforce.

Step 3: Develop a method to collect data.

The key to successfully managing the risks of a remote workforce is to identify and track where employees are working. There are a few ways to accomplish this, including surveys that ask employees to self-report, time sheets to match time worked with location, software to track employee travel, and IP tracing on company-issued laptops and equipment (which may have privacy implications that should be reviewed by the legal department).

Step 4: Communicate, implement, and refine

The final step is implementation. Employee education and communication is key. Businesses need to make clear to employees why the policy is important. Down the road this can help employees understand their role in ensuring compliance and why a request may be denied. HR and company leadership will be integral to change management. Once the policy is put in place, it becomes the employees' responsibility to follow it, so determining when to make this obligation an employee responsibility is important. Has everyone been made aware? Have they been given an opportunity to ask questions? Is there a system in place for employees to acknowledge that they received and understand the policy?

While remote work can be a great benefit for employees, businesses should consider the cost of remaining compliant with obligations created by remote working arrangements. When new employee requests are received, the approval process must be streamlined and concrete. Making adjustments retroactively can expose an organization to unnecessary costs and penalties. Lastly, businesses should have a check-in process to review performance and make sure the policy continues to align with the organization's direction.

Proactive tax planning and seamless tax compliance are essential components of financial success. At FustCharles, we are dedicated to providing year-round support, ensuring you stay informed about emerging opportunities, evolving tax laws, and optimal strategies. Our commitment is to guide you towards the most advantageous course of action aligned with your objectives, ultimately contributing to your business's financial well-being.

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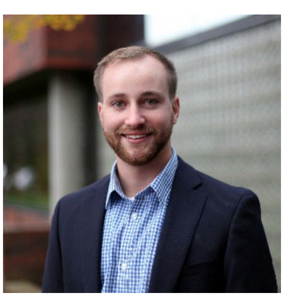

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