



CONSULTING GROUP

Attention to Detail and Regulatory Changes Can Help Minimize Retirement Plan Errors



Due to the complex and ever-changing nature of the Internal Revenue Code (IRC) and the Employee Retirement Income Security Act (ERISA), the number of common compliance mistakes that can cause retirement plan sponsors to run afoul of the law continues to grow.

Plan sponsors who do not stay up to date with changes in regulation or neglect to implement best practices, procedures and strong internal controls risk significant fines, penalties and costly litigation. In 2017, 65.3% of Department of Labor Employee Benefits Security Administration (EBSA) audits resulted in a monetary fine. This totaled to \$1.1 billion in fines, a 72% increase compared to 2016¹.

To fix and prevent common mistakes business owners and managers need to understand the problematic areas where errors tend to occur. For example, the most common violation is failure to timely remit contributions. Other common mistakes include failing to communicate plan changes to participants, miscalculating compensation and distribution amounts; improperly implementing employee deferral elections; or missing reporting deadlines such as Form 5500.

The good news for employers is that many compliance problems can be corrected through voluntary programs. The Internal Revenue Service's Employee Plans Compliance Resolution System (EPCRS) and the Department of Labor's Voluntary Fiduciary Correction Program (VFCP) and Delinquent Filer Voluntary Compliance Program (DVFCP) allow plan sponsors and other plan fiduciaries to correct operational failures, avoid plan disqualification, and limit monetary fines.

While these self-correcting tools are valuable, it is important

that plan sponsors work with service providers who are known for their strong attention to compliance. Plan fiduciaries need to understand the many gray areas pertaining to their responsibilities under the law to avoid being sued.

Following are five additional tips, compiled by USI Consulting Group (USICG), which can help plan sponsors strengthen internal controls and prevent compliance issues.

Review the Plan's Recordkeeper Regularly

Benefit experts recommend conducting a recordkeeper search (RFP) every three to five years. This assessment, which should include an assessment of the recordkeeper's approach to regulatory and compliance issues as well as their cybersecurity capabilities, should be conducted with the help of knowledgeable consultants who understand industry best practices and processes.

For example, USICG recently worked with a client to search for a new recordkeeper after it discovered a number of compliance issues with its current recordkeeper. The USICG team reviewed data, plan documents and rehires for appropriate entry date into the plan and calculated make-up contributions, including interest.

The thorough provider search led to the client switching from its group annuity contract to a top tier mutual fund platform known for its attention to compliance issues.

Document Decision-Making Process

One important guardrail to prevent compliance errors is to document the decision making process before making operational changes. This documentation should include what options were considered before the decision was made, who was consulted, and the reason behind the decision that was reached.

¹ <https://www.compliancebug.com/2017-erisa-dol-fines-penalties/>

Regardless of how big or small the plan is, the retirement plan committee should make sure minutes are taken at each meeting and capture important discussion points, any votes taken, and communication plans.

Finally, the decision-making process should follow the terms of plan documents, such as the adoption agreement and investment policy statement.

Documentation of the decision-making process is an essential shield in the event of audit or litigation and should be retained in a plan due diligence folder.

Periodically Monitor Daily Plan Activity Internally

It is the responsibility of plan sponsors to ensure that all plan transactions are accurately recorded.

While many daily transaction activities, such as contributions, distributions and participant loans can and often should be outsourced to the recordkeeper, the plan sponsor should conduct periodic reviews of the transactions to ensure they are being administered correctly. To facilitate these reviews, top tier recordkeepers provide detailed reporting on transactions. A knowledgeable consultant will help you understand the various applicable regulations to help you assess your recordkeeper's alignment with compliance and the plan document.

Stay Tuned to Legal and Regulatory Changes

In 2018, EBSA audit enforcement activity remained consistent recovering \$1.1 billion in retirement plan benefits. Even more astounding, in 2018 there were 268 criminal investigations, resulting in 142 indictments for crimes related to retirement plans.

Civil investigations can arise from responses by plan administrators to questions on IRS Form 5500 annual reports or by the informal compliant resolution system by which participants can call the EBSA and file complaints against a retirement plan. More than 170,000 participant inquiries were closed in 2018, resulting in a recovery of \$443.2 million in plan benefits.

Some of the IRS Form 5500 responses that can lead to an EBSA audit include: (i) reporting of late salary deferral or loan remittances that have not been corrected, (ii) failure to have a

fidelity bond, (iii) responding that the plan had a black-out period (period in which participants cannot trade for several days), without furnishing the required notice, and (iv) large groups of unpaid terminated vested participants.

These statistics demonstrate that compliance with ERISA from a plan document, operational and fiduciary perspective is critical in avoiding intensive DOL investigations that can result in expensive recoveries to participants and additional DOL penalties.

Further, ERISA excessive fee litigation continues to be at the core of ERISA class action suits with courts examining whether the plan committee or other fiduciary acted as a "prudent expert" in selecting, monitoring and removing plan investment options.

Understanding the factors driving these enforcement actions and lawsuits is critical. USICG provides regular updates on regulatory changes and litigation via newsletters and quarterly plan reviews.

USICG can also assist plan fiduciaries in fulfilling their duties by helping them navigate through the current legal and regulatory environment and understand potential risks to their retirement plan and current fiduciary process.

Fixing Mistakes through EPCRS

Some compliance flaws can be fixed through the IRS' EPCRS program. The self-correction process (SCP) allows a plan sponsor to correct certain errors without contacting the IRS or paying any fee and the voluntary correction program (VCP) permits a plan sponsor to pay a fee and receive IRS approval for correction of plan failures any time before an audit.

If the plan is under audit, another EPCRS program, the audit closing agreement program (Audit CAP), allows sponsors to pay a sanction and correct a failure.

When correcting errors, it is vital to understand how the various programs interact. USICG can help sponsors utilize the various programs offered under EPCRS as well as the Department of Labor's self-correction programs.

To learn more about USICG solutions and strategies to minimize compliance errors, contact your USICG representative.

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