Fix-It Guide

Identifying and Correcting Common Retirement Plan Errors

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Information about Today's Session

- Select "Computer audio" to join
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- Questions can be asked by typing them into the questions pane on the control panel, and our speakers will try to answer them as they come in. Otherwise, there will be time at the end of the session to answer questions
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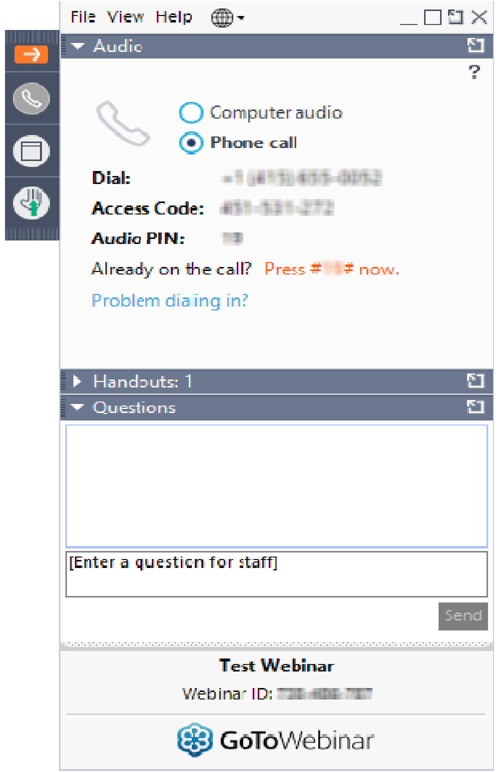


Agenda

- Overview of Common Retirement Plan Errors
- Identifying, Preventing, and Correcting the Problem
  - Case Studies
  - IRS and DOL Correction Programs
- Best Practices and Tips

Overview of Common Retirement Plan Errors

How Compliance Challenges Typically Arise

- Compliance challenges can arise most commonly through:
  - Participant Complaints
  - DOL/IRS Audits
  - Litigation
  - M&A Diligence
- Most compliance issues can be addressed with relatively low penalty if discovered and corrected before audit, diligence, or litigation activity
- Limited correction options available if under audit

IRS Four Compliance Challenge Buckets

Operational	Plan Document
Demographic	Employer Eligibility

IRS Top 10 List

1. Failure to update/amend plan document **(Plan Document)**
2. Failure to correctly apply plan's definition of compensation **(Operational)**
3. Failure to include eligible employees or exclude ineligible employees **(Operational)**
4. Failure to comply with Code Section 72(p) **(Operational)**
5. Impermissible in-service withdrawals **(Operational)**
6. Failure to satisfy Code Section 401(a)(9) minimum distribution rules **(Operational)**
7. Employer eligibility failure **(Employer Eligibility)**
8. Failure to satisfy ADP/ACP nondiscrimination testing **(Demographic or Operational)**
9. Failure to provide Code Section 416 minimum top-heavy benefit or contribution to non-key employees **(Operational)**
10. Failure to satisfy Code Section 415 limits **(Operational)**

ERISA Fiduciary Duties

Two types of fiduciaries for ERISA purposes:

1. Named fiduciaries
2. Functional fiduciaries

ERISA Fiduciary Duties

ERISA § 404 – The Main Four Fiduciary Duties

- Duty of Loyalty (Exclusive Benefit Rule)
  - Includes duty to ensure reasonable fees
- Duty of Procedural Prudence
- Duty to Diversify Investments
- Duty to Follow Plan’s Terms (consistent with ERISA)

ERISA Fiduciary Duties

- Other General ERISA Fiduciary Duties
  - Avoid causing the plan to engage in certain prohibited transactions
    - Guard against self-dealing, imprudent investing, and misappropriation of plan funds
  - Establish and maintain a trust for plan assets
  - Obtain fidelity bond covering all persons handling plan assets
  - Assume personal liability for fiduciary breaches

Top 5 Compliance Challenges

1
FIDUCIARY COMPLIANCE

- Committee governance
- Prudent processes
- Education and training

2
PLAN INVESTMENTS AND PARTICIPANT DATA

- Plan investments and proprietary funds and services
- Cybersecurity
- Fiduciary considerations

3
MISSING PARTICIPANTS AND RMDs

- Required minimum distributions (RMDs) must begin timely
- Correction options
- Locating participants

4
PLAN DOCUMENT COMPLIANCE

- Required plan documents and amendments
- Signed documents, amendments, and corporate actions

5
PARTICIPANT CONTRIBUTIONS

- Timeliness of participant contributions
- Missed deferrals
- Contributions

Identifying, Preventing, and Correcting the Problem

Fiduciary Compliance

Identifying and Preventing the Problem

Fiduciary Process Management

Best Practices:

- Committee Charter
- "Right" committee structure
- Investment Policy Statement
- Quarterly committee meetings
  - Investment review
  - Communication/education review
  - Industry developments
  - Anticipating regulation and legislation
- Committee meeting agenda and minutes
- Regular fiduciary training

"The role of the fiduciary is to act prudently and knowledgeably, and for the exclusive purpose of providing retirement benefits for the employees."

- U.S. Department of Labor

Response to Litigation

4 NONMONETARY SETTLEMENT REQUIREMENTS

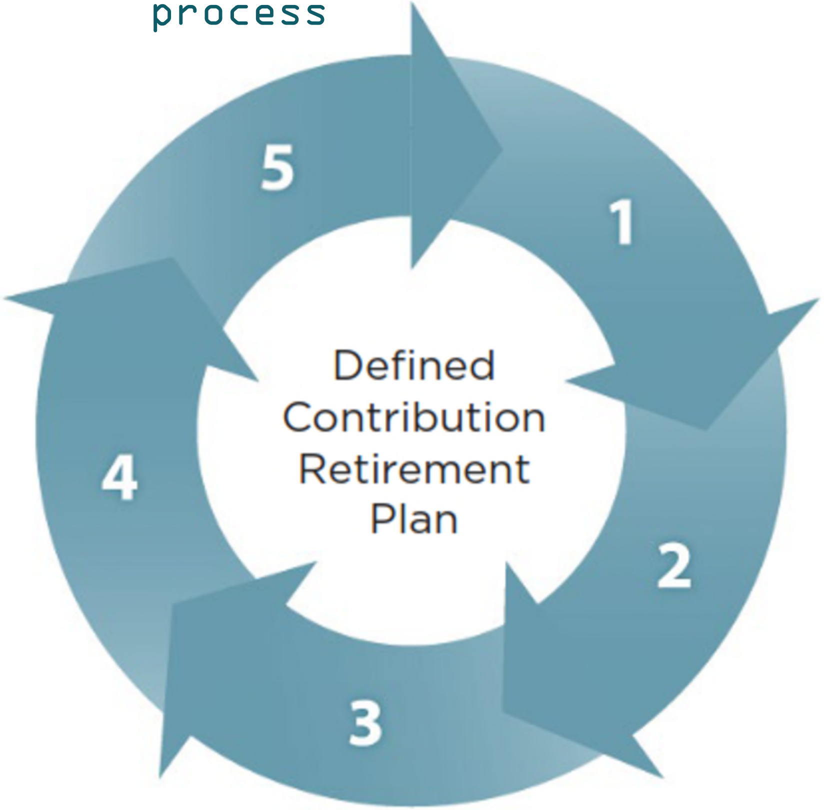
REQUIREMENT:	*Maintain or Hire a Consultant*	*Consultant Must Oversee Investments*	*Must Look at Fees*	*Conduct Recordkeeper RFP*
ACTION:	Advisor RFP	Investment Monitoring	Fee Benchmark	RFP
RESULT:	Improved Fiduciary Governance Process	Improved Investment Performance and Reduction of Investment Options	Reduced Fees	Consolidation of Recordkeepers

Plan Management and Participant Data

Identifying and Preventing the Problem

Investment Selection and Monitoring

Long-term investment success is derived from a disciplined and consistent process



STEP 1	Investment Policy Development
STEP 2	Investment Menu Construction
STEP 3	Investment Selection
STEP 4	Monitoring and Due Diligence
STEP 5	Proactive New Product Research

Vendor Management

VENDOR TOPIC	CORE ISSUES	FIDUCIARY LEADERSHIP
Service Model	Do the services offered meet your plan’s needs?	How can you harness the capabilities and scale of your recordkeeper to further engage participants?
Fees	Are fees reasonable for services rendered?	When did you last perform a fee benchmark?
Fee Method	How does your provider allocate fees?	Will your provider support your preferred fee allocation method?
Open Architecture	Will your vendor bid and service your plan in a recordkeeper-only approach?	Are there more appropriate funds outside of the proprietary funds offered by your recordkeeper?
Legislative Insights	Does your provider keep you abreast of legal developments?	Is your provider on the lookout for emerging issues relevant to your plan?
Proactive Engagement	Does your provider bring you new ideas and technology to enhance your plan?	Have you challenged your providers to come up with new ideas, programs, campaigns, and initiatives to improve participant experience and reduce cost?

Participant Data

IN-PLAN

- Individualized asset allocation guidance and advice
- Savings rate recommendations
- Targeted marketing for individualized retirement plan advice
- "Next best step" insights

THE GRAY AREA

Leveraging acquired information about participants to market or sell products or services unrelated to the plan

OUT-OF-PLAN

- Third-party wellness tools
- Student-debt solutions
- Banking services
- Debt-management services
- IRA rollovers
- Wealth management and financial planning

Missing Participants and RMDs

Identifying, Preventing and Correcting the Problem

Required Minimum Distributions

- Participant A retired in 2012 and turned 72 on December 1, 2021. It is April 1, 2022, and you must begin making minimum required distributions; however, you cannot locate Participant A.
- What do you do?

Unpaid Required Minimum Distributions

- Consequences:
  - Participant is subject to a 50% excise tax
  - Puts the plan's qualification at risk
- EPCRS provides a fix:
  - The plan must pay the missed distributions, adjusted by any applicable gains or losses, for all the missed years
  - Can request waiver of the excise tax through VCP

Unpaid Required Minimum Distributions

- Must be reported on Form 5500
- Exception for reasonable efforts to locate a missing participant or beneficiary

DOL Guidance Regarding Missing Participants

- DOL Field Assistance Bulletin 2014-01 - Steps to locate a missing participant:
  1. Use certified mail;
  2. Check the records of the employer and "related plans" for up-to-date information;
  3. Attempt to identify and contact the beneficiaries designated by those plans for information; and
  4. Use free electronic search tools (such as Internet search engines, public record databases, and social media).
- Larger account balances: Consider whether additional search steps are appropriate (e.g., using a credit reporting agency).

CARES Act Suspension of RMDs for 2020

- RMD Waiver: CARES Act provides 1-year waiver of RMDs from IRAs and qualified plans in 2020 (applies to RMDs for 2020 and those due in 2020 for 2019 if they were not paid in 2019)
- RMDs previously paid to a participant in 2020 could have been rolled over to a qualified retirement plan or IRA by August 31, 2020

Plan Document Compliance

Identifying, Preventing, and Correcting the Problem

Failure to Update/Amend Plan Document

- It’s December 2020, and you are in the process of moving your 401(k) plan to a new TPA. The TPA requests a copy of your most recent plan document. Your most recent prototype adoption agreement is effective 2010. You never amended and restated your 401(k) plan to comply with PPA.
- What do you do?

Rev. Proc. 2019-19: Retroactive Plan Amendment

- Applies to the failure to adopt required or interim amendments
- Does not include the initial failure to adopt a qualified plan or the failure to timely adopt a written 403(b) plan document
- Plan must have a favorable IRS letter
- Correction must be made within the required time period for correcting significant failures through self-correction (generally 2 plan years)
- Does not extend to discretionary plan amendments

Rev. Proc. 2019-19: Retroactive Plan Amendment

- Rev. Proc. 2019-19 permits retroactive plan amendment to conform plan terms to plan operations if:
  - (1) the amendment would result in an increase of a benefit, right, or feature;
  - (2) such increase is available to all eligible employees; and
  - (3) providing the increase is permitted under the Code and satisfies the general correction principles of EPCRS (this includes nondiscrimination requirements).

Participant Contributions

Identifying, Preventing, and Correcting the Problem

Failure to Correctly Apply the Plan's Definition of Compensation

- While preparing your 2019 plan audit, your auditor compared your plan deferrals for 2019 to the W-2 information you provided and identified an error. You failed to take deferrals from the cash bonuses you paid in June 2019. All 200 of your active participants received these bonuses (total $200,000). The estimated amount that should have been deferred is $12,000. For 2019 you matched 100% of the first 3% deferred.
- What should you do?
- What if the error goes back 10 years?

Failure to Include Eligible Employees

- You hired a new employee on June 1, 2019. She makes an election to participate and deferrals should have begun on July 1, 2019, but she was never enrolled. On a routine audit of the plan, this error is discovered on February 1, 2020.
- What do you do?

Failure to Include Eligible Employees

	Deadline to Commence Deferrals	Deadline to Provide Notice	Corrective Matching Contributions (if the participant was eligible for matching contributions)	QNEC for Missed Deferral Opportunity
No automatic enrollment feature	Earlier of payment of first compensation that begins on or after: (1) the end of the second plan year following the plan year in which failure occurred, or (2) Last day of the month following the month in which employee notified employer of the failure.	Notice must be provided within 45 days of the commencement of correct deferrals	Corrective contribution equal to the matching contributions the employee would have received if the missed deferrals had been made (adjusted for earnings)	25%
Automatic enrollment feature *Available for failures that occur on or before December 31, 2020	Earlier of payment of first compensation that begins on or after: (1) 9½ months after plan year in which failure occurred, or (2) Last day of the month following the month in which employee notified employer of the failure.	Same as above	Same as above	None

Failure to Timely Deposit Employee Elective Deferrals

- Company A's pay periods end every other Friday. Each pay period, participant contributions total $10,000, which reasonably can be segregated from Company A's general assets by 2 business days following the end of each pay period. Company A should have remitted participant contributions for the pay period ending March 4, 2019, to the plan by March 6, 2019 (the Loss Date) but actually remitted them on April 15, 2019 (the Recovery Date). In early 2020, a plan official discovers that participant contributions for this pay period were not remitted on a timely basis. To comply with the VFC Program, the plan official determined that she would repay all Lost Earnings on January 30, 2020.
- What do you do?

DOL Voluntary Fiduciary Correction Program (VFCP)

- Certain fiduciary breaches are eligible for correction
  - e.g., delinquent participant contributions
- To be eligible for VFCP, neither the plan nor the applicant can be under investigation
- Generally, correction amount is the (1) principal amount, (2) lost earnings for the period of the transaction, and (3) interest on lost earnings
- May be eligible for excise tax relief

Best Practices and Tips

Best Practices and Tips

- Maintain plan records
  - Records of operations (generally, 6-year rule)
  - Plan documents (indefinitely)
- Use a calendar that notes when you must complete amendments
- Review your plan document annually
- Communicate changes with the relevant parties
  - e.g., payroll department, recordkeeper
- Confirm that plan administrators have adequate employment and payroll records to make calculations

Questions?