



Technical, Marketing & Human Resource
Tools for Benefit Professionals

Employee Benefits Compliance Review Program

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Introduction

We have designed a program which offers a structured examination and review of all employee benefit programs offered by an employer. The program is designed to assure compliance by employee benefit programs, in both form and operation, with the requirements of the Employee Retirement Income Security Act of 1974 (“ERISA”), the Internal Revenue Code and other applicable federal and state requirements.

This Employee Benefits Compliance Review consists of three principal phases:

- (1) initial request and gathering of relevant information and documents;
- (2) on-site investigation and conferences with the client's employee benefits personnel; and
- (3) a written report which discusses the existing employee benefit plan documents, practices and policies with recommendations and suggestions for improvement of existing policies and practices or additional policies and practices, where advisable.

Summary of Review Components

Our attorneys will work through a questionnaire-type review which is designed to reveal areas of the client's plans, practices, policies and procedures that may result in legal attack or liability under current statutes, regulations and case holdings. The key elements of the review are:

Plan Identification

This phase of the review will assist the client in the identification of all programs and policies which might be considered "Employee Benefit Plans" subject to regulation under ERISA. Once identified, the plan will be categorized as either a "welfare plan" or a "pension plan," the two recognized and regulated sub-categories of employee benefit plans. In many cases, the existence of a "plan" will be obvious. In other cases, a program or policy will have been misidentified or not recognized as subject to regulation or reporting and disclosure requirements. For example, many employers maintain supplemental executive retirement programs or salary continuation programs which are not recognized as "pension" plans subject to special reporting requirements.

Plan Documentation

One of the core requirements of ERISA is that *"Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."* (29 USC 1102).

In addition, ERISA requires that most plans prepare and distribute a "Summary Plan Description."

A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.

We are constantly reminded, as are the federal courts, of the extent to which the foregoing documentation requirements are either ignored or implemented without sufficient attention to the important **substantive** implications of plan documentation. For example, cases on the subject of the rights of an employer to terminate or modify a welfare benefit program

which has not focused on the precise language used in plans, booklets and other documents under which a plan is maintained, are rare at best. Conversely, critical “standard of review” language is almost always highlighted in litigation concerning denied claims.

Finally, as to plan documentation, most retirement plans are subject to detailed requirements as to **form** under the provisions of the Internal Revenue Code. The qualified status of a retirement plan often turns on the presence of what might be called “magic words” in a plan document and whether the form of document has been reviewed by the Internal Revenue Service and a “Determination Letter” issued upon which the plan sponsor may rely.

Plan Operation

Often, even if a plan is properly documented, and “says” the right thing, the complicated and burdensome requirement to operate a plan “in accordance with its terms” is ignored or, more often, misunderstood. For example, changes in the law are not recognized in plan operations or “old” forms are used. These operational shortcomings often create substantive rights for adversely effected participants and, more ominously, are the most frequent basis for threatened plan “disqualification” and the imposition of significant civil monetary sanctions. Some examples of the operational areas included in our review include:

- Eligibility and Coverage, including controlled group and domestic and foreign affiliate analysis;
- Distribution compliance including appropriate participant and spousal waivers of protected distribution rights;
- QDRO administration and compliance;
- Claims procedure compliance, including revised Group Health Plan review procedures;
- COBRA and HIPAA compliance;
- Non-discrimination testing and compliance, including 401(k) “ADP” and “ACP” testing; and
- Timely transmission and deposit of employee contributions to 401(k) and other programs.

Reporting and Disclosure

Most employee benefit plans covered by ERISA are subject to annual reporting requirements. Reporting most often takes the form of the filing of Form 5500, with required schedules, with the United States Department of Labor, the Internal Revenue Service, or both. Substantial penalties can be assessed for lack of timely filing. Our

review, in addition to assuring that required filings are being made, will also assess filing efficiency and economy issues such as whether multiple welfare “programs” can be filed as a single plan, saving time and money. In addition, we will review whether any economies can be achieved through revised filing approaches which might eliminate costly audit requirements or reduce the cost of an otherwise required audit.

Coupled with the reporting requirements, as mentioned above, are comprehensive disclosure requirements. These requirements generally involve the mandatory distribution of plan informational materials to participants and beneficiaries, and the periodic updating and re-distribution of these materials to reflect changes in plan terms or other significant operational features. Included among these required items are “Summary Plan Descriptions” and “Summaries of Material Modifications.” In addition to these regularly required distributions, certain information about a plan and its benefits is required to be distributed upon the request of a participant. Again, substantial penalties can be assessed for failure to adequately and timely disclose such information. Our review will assure that the proper mechanisms are in place to provide timely, accurate and compliant reporting and disclosure material for all employee benefit plans.

Fiduciary Compliance

Perhaps the most important aspect of our review, and the aspect of plan operation and administration which receives little attention in the typical “procedural” audit, is the compliance associated with fiduciary responsibility. A fiduciary breach can be the most costly and, frankly, embarrassing of any plan shortcoming. Our review is decidedly not an **investment** review, but rather a review of fiduciary structure and processes in relation to each employee benefit plan. We think the greatest fiduciary risk is not results driven, but process driven.

ERISA’s fiduciary standards are deceptively straightforward:

“...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.”

Our review of fiduciary issues will include:

- The identification of persons or entities (committees and the like) who might be fiduciaries or co-fiduciaries. Since ERISA’s definition of a “fiduciary” is functional, one or more persons may be carrying out fiduciary tasks, with attendant fiduciary responsibility, without even considering the tasks to be covered by fiduciary standards.
- An assessment of whether the decision making process for plan related matters is structured in such a way that certain non-fiduciary discretion can be appropriately reserved to the plan sponsor as a “settlor” decision, subject to an entirely different, and less onerous standard than fiduciary decisions.
- A determination of whether fiduciary exposure is insurable and, if so, whether such risk is adequately insured.

Report And Recommendations

Upon completion of our review, appropriate plan or sponsor representatives, as designated in advance, will be provided with a comprehensive report of our findings and conclusions. In general, our report will be organized in the same manner as the review covering the following topics:

- (1) Plan Identification
- (2) Plan Documentation
- (3) Plan Operation
- (4) Reporting and Disclosure
- (5) Fiduciary Compliance

Depending on the nature of our findings and conclusions, our Report may include two broad categories for action. First, we would cover findings in one or more of the major subject areas of the audit which deserve “risk management” attention. These are areas in which, while we will have discovered no specific shortcomings or deficiencies, we believe that changes in policies or procedures could be implemented to diminish the likelihood of future problems. These recommendations might include suggested changes in administrative responsibility for plan administration or suggested procedures for improved coordination among corporate finance, human resource and legal departments.

The second component of our report would cover specific deficiencies requiring prompt attention. As to this second component, our report will include recommendations for a specific course of action involving prior “open” non-compliance time periods. These recommendations might include the following options:

- Self-correction under available governmental programs including IRS’s “EPCRS” Program (Employee Plans Compliance Resolution System). This program includes a number of “supervised” and “unsupervised” pre- and post-audit approaches to many plan deficiencies. Often, the penalties applicable under this program can be significantly less than those that would be applied if no plan sponsor action is taken to correct a deficiency.
- The filing of appropriate excise tax or other returns required to report a violation and the “correction” of a violation in connection with the filing of the returns.
- Self-correction under the Department of Labor’s (DOL’s) VFC (Voluntary Fiduciary Correction) Program or DFVC (Delinquent Filer Voluntary Compliance) Program. As with the IRS programs, the DOL program is designed to encourage self-assessment and self-correction of plan defects at significant savings to proactive plan sponsors.

Cost, Timing And Miscellaneous Issues

Cost

We will, upon request, prepare a detailed cost estimate for an Employee Benefit Plan Review. In general, our fees will be based on our normal hourly rates for attorneys and project assistants assigned to the engagement. If requested, we will set, and stay within, a co-developed budget. Based on past experience, the factor which is most predictive of cost associated with the review is employee/participant headcount. As headcount increases, so does complexity of the benefit programs and the likelihood of multi-site variations in programs and administration.

Our estimate of fees, as quoted upon request, will be for the Review and Report only. Additional fees will apply if we are engaged to implement remedial action or to represent the plan sponsor before a government agency in connection with a self-correction program.

Timing

As with cost, the time that it will take for us to complete our Review and Report will vary based on the size, complexity and location(s) of the plan sponsor. In general, however, our goal would be to complete our Review and deliver our Report within 60 days of our engagement.

Privilege and Communication

Our engagement for a Review and Report will be undertaken in our capacity as lawyers providing legal services. We think this is important for us and for you, as our client, since this lawyer-client relationship will implicate the attorney-client privilege. As a result, our work-product, our communications with you (and yours with us), and our conclusions should be afforded protection from disclosure to third parties, including participants and government agencies. The information that we gather during our review will be delivered to the attorney in charge of the Review and will be prepared at our request and under our supervision. All documents will be stamped accordingly.