

Retirement Plan Compliance Check-Up

Does Your Plan Measure Up?



CliftonLarsonAllen

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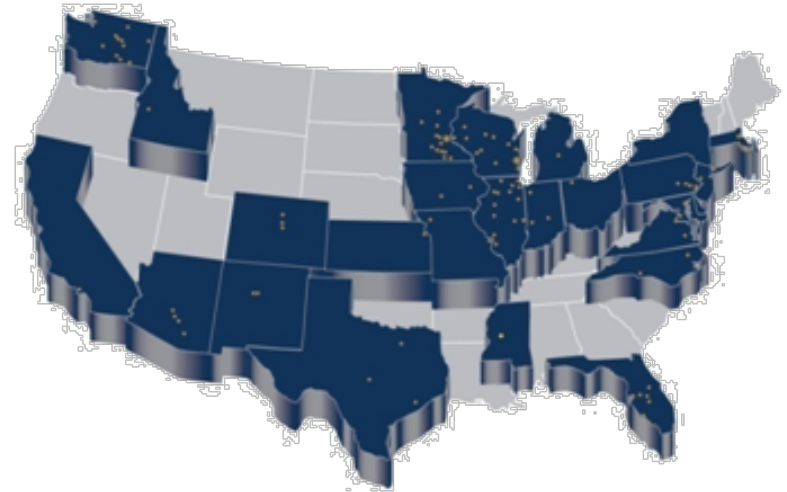


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About CliftonLarsonAllen

- One of the nation's top 10 CPA and consulting firms
- Service areas include audit, accounting, tax, consulting, and advisory
- Within our employee benefit plan group, our 30 partners and 300 professionals audit more than 1,900 plans across the country and provide compliance for hundreds more.



Speaker Introductions

Terry Halfman, CPA

Partner, Employee Benefit Plans

- More than 20 years experience in employee benefit plans, overseeing audits of single, multiple-, and multi-employer employee benefit plans, including defined benefit and defined contribution pension plans, ESOP's, 11-K's, and welfare plans
- Extensive consulting experience regarding plan administration, operations, and compliance matters
- Assists in the development and presentation of industry training and development of audit tools



Speaker Introductions

Kelly Davis, ERPA

Manager, Employee Benefit Plans

- Consults nationally with plan sponsors on a wide array of employee benefit topics including healthcare reform
- Firm lead on employee benefit plan tax and ERISA consulting and compliance services
- National author and speaker on various employee benefit topics
- Member of the AICPA Employee Benefits Tax Technical Resource Panel
- Member of the AICPA HealthCare Tax Task Force



Learning Objectives

- Identify common qualification failures
- Become familiar with correction methods and programs
- Tips to help prevent failures
- Identify targeted issues of a DOL or IRS plan examination



Polling Question



Retirement Plan Compliance



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Retirement Plan Compliance

- The Internal Revenue Service and the Department of Labor have joint jurisdiction with respect to retirement plan compliance and reporting
 - IRS compliance with Internal Revenue Code for tax-favored preference on retirement plan benefits
 - DOL compliance with ERISA to protect participant and beneficiary rights to receive their retirement plan benefits
 - Retirement plans must meet form and operational requirements



Qualification Failures

Qualification Failure

- A qualification failure is any failure that affects the qualification status of a retirement plan
 - May jeopardize a plan's tax-favored preference (disqualified)
 - Correction can be expensive, time consuming and frustrating
 - Generally no materiality limits for correction with the IRS and DOL
 - Important for employers to identify and correct failures

Qualification Failure

- A retirement plan includes:
 - Any qualified plan, such as a 401(k) Plan, Profit Sharing Plan, Defined Benefit Plan, Money Purchase Plan
 - 403(b) Plan
 - SEP
 - SIMPLE IRA Plan

Qualification Failure – Impact of Disqualification

- When a retirement plan is disqualified, the plan's trust loses its tax-exempt status impacting employees, the employer and the plan's trust:
 - Employees Include Contributions in Gross Income
 - Employer Deductions are Limited
 - Plan Trust Owes Income Taxes on the Trust Earnings
 - Rollovers are Disallowed
 - Contributions Subject to Social Security, Medicare and Federal Unemployment (FUTA) Taxes

Qualification Failure

- Internal Revenue Service Identifies 4 Types of Qualification Failures:
 - Plan Document Failure
 - Operational Failure
 - Demographic Failure
 - Employer Eligibility Failure

Qualification Failure

- Plan Document Failure
 - A plan provision (or the absence of a plan provision) that, on its face, violates the requirements of IRC § 401(a) or 403(a)
 - For example, if a plan has not been timely and properly amended or restated for required legislative updates, the plan has a Plan Document Failure

Qualification Failure

- Operational Failure
 - An Operational Failure arises from the failure to follow plan provisions and the plan was not operated in accordance with the terms of its governing plan document and amendments

Qualification Failure

- Demographic Failure
 - A Demographic Failure results from the failure to satisfy nondiscrimination and coverage requirements of IRC § 401(a)(4), 401(a)(26), or 410(b)
 - The correction of a Demographic Failure generally requires a corrective amendment to the plan to add more benefits or increase existing benefits

Qualification Failure

- Employer Eligibility Failure
 - An Employer Eligibility Failure is the adoption of a plan intended to include a qualified cash or deferred arrangement by an employer that fails to meet the employer eligibility requirements to establish a 401(k) plan
 - An Employer Eligibility Failure is not a Plan Document, Operational, or Demographic Failure



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Common Qualification Failures – IRS Top 10 List

IRS Top 10 List

- 1) Eligible compensation improperly included / excluded from contribution calculations
 - ◇ Bonuses
 - ◇ Allowances
 - ◇ Uncommon pay types
- 2) Eligibility issue ~ Improper exclusion from the plan
- 3) Eligibility issue ~ Improper inclusion in the plan
- 4) Distribution failures
 - ◇ Incorrect distribution amounts – improper forfeitures
 - ◇ Distribution to ineligible participant
 - ◇ Incorrect vesting

IRS Top 10 List

5) Deferral failures

- ◇ Automatic enrollment provisions not followed
- ◇ Changes in participant deferral elections
 - Failure to implement
 - Untimely implementation

6) Plan document failures

- ◇ Untimely restatement or amendment for regulatory plan changes
- ◇ Documents unsigned
- ◇ Original signed documents, amendments, determination letters not kept on file by plan sponsor (employer)

7) Failure to follow the Plan's matching contribution provisions

IRS Top 10 List

8) Failure to satisfy the ADP / ACP nondiscrimination tests

- ◇ Testing not performed timely
- ◇ Corrections not properly made
- ◇ Attribution rules for HCE's and Key employees not followed
- ◇ Control groups
- ◇ Not following plan document provisions

9) Improper hardship withdrawals

10) Issues with participant loans

- ◇ Failure to conform to the requirements of the plan document, loan policy and / or the Internal Revenue Code



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Common Fiduciary Breaches

Fiduciary Breaches

- The Employee Retirement Income Security Act (ERISA) sets standards of conduct for those who manage an employee benefit plan and its assets
 - Requires plan fiduciaries to act prudently and solely in the interests of the Plan's participants and beneficiaries
 - Prohibits self-dealing
 - Provides judicial remedies when violations of these standards cause harm to plans

Fiduciary Breaches

WHO IS A FIDUCIARY?

- A Plan must have at least one fiduciary (a person or entity)
 - May be an administrative committee or Board of Directors
 - Fiduciary status is based on the functions performed and not just a title
- Ordinarily will include
 - Trustee(s)
 - Investment advisers
 - All individuals exercising discretion in the administration of the plan

Fiduciary Breaches

- The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control
- Attorneys, accountants and actuaries generally are not fiduciaries when acting solely in their professional capacities

Fiduciary Breaches

- Responsibilities of being a fiduciary
 - Subject to standards of conduct
 - Acting solely in the interest of plan participants and beneficiaries
 - Carrying out their duties prudently
 - Following the plan documents (unless inconsistent with ERISA)
 - Diversifying plan investments
 - Paying only reasonable plan expenses

Fiduciary Breaches

- If a fiduciary lacks expertise in an area such as investment management, they should hire someone with the professional knowledge
- Wise to document decisions as well as the basis for decisions
 - Document the processes used to carry out fiduciary responsibilities
 - Monitoring of 3rd party service providers
- Potential liabilities to fiduciaries
 - Maybe personally liable to restore any losses to the plan

Fiduciary Breaches

- Certain transactions are prohibited under law to prevent dealings with parties who may be in a position to exercise improper influence over the plans
 - Who is prohibited from doing business with the plan?
 - ◇ Prohibited parties (parties in interest) include the employer, the union, plan fiduciaries, service providers, and statutorily defined owners, officers and relatives of parties in interest

Fiduciary Breaches

- Prohibited transactions include:
 - A sale, exchange, or lease between the plan and party in interest
 - Lending money or other extension of credit between the plan and party in interest
 - Furnishing goods, services, or facilities between the plan and party in interest
 - Fiduciaries who use the plan's assets in their own interest or who act on both sides of a transactions involving a plan
 - Self-dealing activities

Fiduciary Breaches

- Some of the more common fiduciary breaches include:
 - ◇ Late Form 5500 filings
 - ◇ Late remittance of participant contributions and loan payments
 - Considered lending of plan assets or an extension of credit between the plan and the plan sponsor
 - ◇ Prohibited loans
 - Loans at below market rates
 - Loans not in accordance with plan document

Fiduciary Breaches

- Timely remittance of participant contributions closely scrutinized by the DOL
 - DOL regulations require an employer to remit employee 401(k) deferral contributions to the trust as of the earliest date on which such contributions can be reasonably segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which such contributions were withheld.
 - Ongoing area of focus by the DOL

Fiduciary Breaches

- The earliest date deferrals can be remitted?
 - Consider time frame in which payroll taxes are remitted
 - Look at consistency of when remittances are being made
 - ◇ DOL will look at the pattern and scrutinize inconsistencies
 - Not remitting as soon as possible because it is simply not convenient to the employer is not acceptable to the DOL
 - Delays in remitting because of issues with 3rd party service providers are still the responsibility of the employer



Polling Question



What to do now?

Correction programs available

What to do Now?

The Department of Labor has programs for correction of Fiduciary breaches

The Internal Revenue Service has correction programs for Qualification failures

Department of Labor Correction Programs

- The DOL provides compliance assistance through programs aimed at correcting fiduciary breaches under ERISA
 - ◇ Delinquent Filer Voluntary Compliance Program (DFVCP)
 - ◇ Voluntary Fiduciary Correction Program (VFCP)

Delinquent Filer Voluntary Compliance Program (DFVCP)

- Available for late filing of the annual Form 5500
 - All qualified retirement plans and
 - Health & welfare plans with 100+ participants
- May be used at a reduced penalty prior to an IRS or DOL notice or audit discovery
 - Plans less than 100 participants - \$750/year up to \$1500
 - Plans over 100 participants - \$2000/year up to \$4000
- Following completion of program, the IRS also recognizes the Form 5500 as having been filed through DFVCP and will not penalize for late filings for those years

Voluntary Fiduciary Correction Program (VFCP)

- Other fiduciary breaches may be corrected through application to the DOL under VFCP
 - Designed to encourage employers to voluntarily comply with ERISA by correcting fiduciary violations / breaches
- Procedure
 - Identify violation
 - Correct violation
 - Restore losses or profits and interest to the plan
 - Application submission to the DOL
 - Upon acceptance, DOL will issue a “no action” letter
 - IRS will also recognize no action letter

Voluntary Fiduciary Correction Program (VFCP)

- Covered transactions that can be corrected:
 - Delinquent participant contributions and loan repayments
 - Loan violations
 - Purchase / sale of assets to / from a party in interest
 - Improper valuations
 - Improper payment of plan expenses



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Internal Revenue Service Correction Program

- The IRS provides compliance assistance through their Employee Plans Compliance Resolution System (EPCRS)
 - Permits plan sponsors to correct qualification failures and continue to provide their employees with retirement plan benefits on a tax-favored basis

EPCRS

- Outlined by the IRS through Revenue Procedures
 - EPCRS has been available for years
 - Rev. Proc. 2008-50
 - ◇ Recently updated to Rev. Proc. 2013-12, effective April 1, 2013
 - ◇ Key Changes Include:
 - Correction guidance for 403(b) plans to correct plan document and operational failures that failed to comply with the new requirements of the final 403(b) regulations beginning with the 2009 plan year
 - Failure to timely adopt a written 403(b) plan may only be corrected under submission with the IRS or an AuditCap if under IRS examination

EPCRS

- Key Changes Include (cont'd):
 - New methods to address lost participants owed benefits, as the IRS letter forwarding program is no longer available as a safe harbor search method
 - ◇ Examples: Use of a commercial locator service, a credit reporting agency or internet search tools
 - Qualified Non-elective Contributions (QNEC's) used to correct a plan's failed ADP or ACP Test may not be funded from plan forfeitures
 - 457(b) Plans sponsored by tax-exempt and government entities now have limited availability for correction under EPCRS, generally only government entities sponsoring a 457(b) Plan

EPCRS Programs

- 3 Programs available under EPCRS
 - **Self-Correction Program (SCP)**
 - ◇ Self correct errors
 - No application, reporting or fee to the IRS
 - Employer must have established practices and procedures
 - Operational failures only (failure to follow plan terms)
 - ◇ Significant vs. insignificant failures
 - Will determine correction options
 - ◇ Time requirements
 - Generally the last day of the 2nd plan year following the plan year in which the failure occurred

EPCRS Programs

– Voluntary Correction Program (VCP)

- ◇ Employer identifies qualification failures to the IRS through a submission to the program
- ◇ Employer outlines proposed method to correct failure
- ◇ Employer outlines changes in administrative procedures to ensure failure does not recur
- ◇ Employer and IRS agree to proposed method of correction and revision to administrative procedures
- ◇ Employer pays a compliance fee – with submission
- ◇ Provides protection from disqualification actions if done timely
- ◇ Plan not under examination

EPCRS Programs

– Audit Closing Agreement Program (Audit CAP)

- ◇ Plan under IRS examination
- ◇ Available for resolving qualification failures identified during the course of the IRS examination or during the course of an application for a favorable determination letter
- ◇ Employer enters into closing agreement with IRS, pays a sanction and corrects the failures
- ◇ Failure to correct may result in plan disqualification

EPCRS Correction Principles

- Requires:
 - Full correction, including closed years
 - Restoration of the plan and participants to position if failure had not occurred
 - Reasonable and appropriate correction
 - Keep assets in the plan
 - Corrective allocations and earnings based on plan terms
 - Consistent application
 - Report distributions

Tips for Identifying Potential Failures

- Plan fiduciaries, administrators, participants and 3rd party service providers having full understanding of plan terms and communications
- Periodic review of plan operations and terms
- Adequate internal controls over plan operations
- Monitor service providers



Polling Question



IRS and DOL Examinations

Or why you want to find it and fix it yourself, and now!

IRS and DOL Examinations

- IRS Examination
 - Plan selected for audit (5500 or other inquiries)
 - IRS sends letter to employer requesting the review of plan records and documents
 - Appointment is set
 - IRS agent conducts examination
 - ◇ Generally onsite, however employer can request alternate site
 - Requests for additional information
 - Issues identified requiring changes
 - ◇ Tax changes (income or excise taxes)
 - ◇ EPCRS Program for correction
 - ◇ Unagreed case

IRS and DOL Examinations

- DOL Examination
 - DOL is focused on participants being treated fairly and fiduciary breaches
 - ◇ Response to participant phone calls to the DOL
 - ◇ Review of Form 5500s
 - Looking for bonding, very large transactions, late remittances
 - ◇ Target areas of interest
 - Prohibited transactions
 - Fiduciary violations
 - ESOPs
 - Multiple Employer Plans and MEWAs
 - Criminal acts including embezzlement and willful violation of regulations and laws



Where to find more information



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IRS and DOL Compliance Websites

For more information

http://www.dol.gov/ebsa/compliance_assistance.html

<http://www.irs.gov/Retirement-Plans/Plan-Sponsor/Fix-It-Guides---Common-Problems,-Real-Solutions>

<http://www.irs.gov/Retirement-Plans/Retirement-News-for-Employers>

Open Forum – Questions?





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