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TOP 10 MISTAKES employers make with retirement plans

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Employers are too often caught off guard when they receive a letter or phone call from the Internal Revenue Service or Department of Labor announcing intent to review the employer's existing retirement plan. Such a situation is never desirable but, if properly handled, can be nothing more than a temporary inconvenience to the employer and its employees. Being guilty, however, of any of the following "mistakes" can spell disaster for the employer and its current business operations:

1. Failure to understand the importance of being a plan "fiduciary." Too often we hear that an employer "signed some forms" for a retirement plan because he was told it would be good for business, but the employer doesn't believe he has anything to do with the plan thereafter. Yet the Employee Retirement Income Security Act of 1974 says under Section 3(21) that anyone who has the authority or discretion to implement, maintain or administer the retirement plan or its underlying plan assets is deemed a "fiduciary." Moreover, ERISA Section 404 indicates that such employer fiduciaries can be held personally liable for the decisions and actions made while the plan exists. Of note is that most investment brokers and accountants are not fiduciaries under these standards.

2. Failure of company fiduciaries to understand that decisions must always be made in the best interest of the plan participant and not the company's own best interests. Under ERISA, the plan fiduciary must make prudent decisions that are in the plan participants' best interests, with no evidence of corporate "self-dealing." This is a broad-sweeping requirement that affects everything from the way in which the plan's investments are selected to the manner in which the plan's assets are expended.

3. Failure to maintain or understand the terms of the written plan document. ERISA requires every retirement plan to be maintained in accordance with a written plan document, and the Internal Revenue Code of 1986 specifies that the plan must also be written and periodically updated to remain in compliance with the code. Employers should take care to understand these written document requirements and should also take time to know if the plan document is actually written correctly.

4. Failure to have a written investment policy statement (IPS) and a committee that meets regularly. Although an IPS is not required under the Internal Revenue Code or ERISA, the Department of Labor often will ask for a copy of any written IPS documentation to evidence the plan's objectives for how to select and monitor the plan's investments, and to assist in determining whether the employer or its delegated committee representatives are making investment decisions in the participants' best interests.

5. Failure to interact or communicate with your payroll department/ payroll provider about plan eligibility or enrollment requirements. Even when employers take the time to prepare a written plan document, if they don't properly communicate the plan's terms to their payroll personnel (e.g., is bonus compensation to be included in 401(k) salary deferral contribution calculations?), the employer may cause the plan to be in violation of its written terms — and risk noncompliance as a result.

6. Failure to consider the impact of subsidiaries or other related company activity. Although exceptions can exist, entities within the same corporate-controlled group are treated for retirement plan purposes as being the same employer for IRS qualification and annual coverage and nondiscrimination testing.

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7. Failure to take required action in a timely manner. Even the most passive retirement plan must undertake certain annual compliance steps to maintain its approved status under existing IRS or Department of Labor requirements. Failure to meet any of these requirements can result in significant penalties and personal liability to the plan and its fiduciaries.

8. Failure to know and monitor plan expenses. These are some terms that every plan fiduciary should not only be aware of but also have an immediate grasp of their importance in today's litigious environment: "12(b)1 fees," "sub t/a fees," "revenue sharing," "ERISA allocation accounts." Also remember there is no such thing as a "free plan."

9. Failure to acknowledge mistakes that are made and correct them in a timely manner. While the IRS and Labor Department are usually sympathetic to reasonable mistakes for which the employer is taking steps to correct (and both the IRS and Labor Department have favorable self-correction programs to encourage employers to voluntarily make such corrections), neither the IRS or Labor will accept ignorance of these responsibilities as a defense in any situation and playing "audit roulette" is seldom a successful formula as a result.

10. Failure to use qualified professionals to assist in maintaining compliance of the company's retirement plan. Many employers either underestimate the level of compliance responsibility involved with the sponsorship of a retirement plan, or they overestimate the level of qualification of their internal staffing and their availability to perform all necessary tasks. Competent outside advisors are not only helpful in mitigating the employer's inherent fiduciary responsibility, but they are vital in evidencing to the regulatory authorities that this employer understands its fiduciary responsibilities and has taken steps to ensure compliance as a result.

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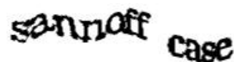

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