Common Fiduciary Errors

An ounce of prevention is worth a pound of cure. This saying is universal, and certainly applies to fiduciary responsibility. Beginning the year with an eye towards avoiding some of the most common errors makes sense. Most fiduciary errors are unintentional or even well meaning. Here are some examples.

Following Plan Documents and Communicating Changes

Possibly the most frequent source of fiduciary breach, interpretation of plan provisions is not always intuitive. The remittance of participant deferrals "as soon as administratively possible" means as soon as possible, not as soon as convenient. A common response when a plan administrator is asked how they determined applicability of a specific plan provision (e.g., eligibility for employer match) is "the prior administrator told me how to do it". This response does not necessarily instill confidence that it is being handled correctly. Many administrative errors go on for years, and every year not corrected is another fiduciary breach. A common example is the management of plan forfeitures (non-vested assets left in plan by a terminated participant). The rule is to allocate these assets annually at years end. This can be a costly and administratively cumbersome correction, but all too often it's not accomplished annually which violates the rule forbidding plan unallocated assets.

The definition of compensation in the plan document may not be the same definition used by your payroll department/service. Furthermore, many plans and employers have different naming conventions for the various money types: deferrals, employer match, bonuses, pre-tax health insurance premiums, FBA plan, commissions and tips, or fees for professional services may be included as compensation. When plan documents are changed or updated, compensation administration needs to follow. It is a good idea to check this periodically to ensure consistency.

Participant loans are another area that can cause issues, especially if more than one loan is allowed at a time or loan payback is allowed to continue post termination of service.

Often, plan operations do not match up with the plan terms. This includes the terms in plan documents, the summary plan description, loan procedures, and an Investment Policy Statement (IPS).

Changes in the plan should be communicated to plan participants. A summary of material modifications should be given to plan participants within 210 days after the end of the plan year in which the modifications were adopted.

Participant Eligibility

Plan documents should have a definition of employees (hours worked or elapsed time) and the requirement for eligibility to participate and employer contributions. The manner in which hours are calculated, hiring dates, or compensation calculations could be problematic. ERISA does not recognize the term "part-time employee." It strictly takes into consideration hours worked or elapsed time to determine eligibility for deferrals and employer match. In addition, the SECURE Act just created additional requirements as regards long-term part-time employees' eligibility.

ERISA Reporting and Recordkeeping

Employers are required to maintain records relating to

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employee benefit plans per ERISA. Record maintenance varies by type of document for both plan level and participant level records. Plans with 100 participants or more must file Form 5500 Annual Returns/Reports of Employee Benefit Plan and conduct an annual audit. Smaller plans must also file annual reports, with plans with less than 100 participants filing Form 5500-SF.

Investment Policy Statement

Maintaining and following an IPS is of utmost importance. There have been successful lawsuits where an employer acted in the best interest of participants, but IPS had requirements that the fiduciaries failed to follow to the letter and the result was costly to plan sponsors.

Understanding and Discharging ERISA Fiduciary Responsibilities

Many plan sponsors and fiduciaries are not fully aware of their roles/responsibilities. ERISA law pertaining to DC plans is quite complex and sometimes unintuitive and unclear (What does "procedural prudence" really mean?). Our Fiduciary Fitness Program is designed to gauge the fiduciary health of your plan, explain applicable fiduciary mitigation strategies, and to remedy, and hopefully avoid, fiduciary breaches. It is quite comprehensive, clear, and includes the ERISA required documentation

Correcting ERISA Compliance Mistakes

Many ERISA compliance problems can be corrected through voluntary compliance programs, when detected early by the plan, to reduce the potential for fines and penalties. The Department of Labor has the Delinquent Filer Voluntary Compliance Program (DFVCP) and the Voluntary Fiduciary Correction Program (VFCP). Through these programs, Plan Administrators can file delinquent annual reports through the DFVCP, and the VFCP allows fiduciaries to take corrective measures resulting from certain specified fiduciary violations for relief from enforcement actions. In addition, the Internal Revenue Service (IRS), through the Employee Plans Compliance Resolution System (EPCRS), has both the Voluntary Compliance Program (VCP) and Self Correction Program (SCP) which allow plan sponsors and other plan fiduciaries to correct failures in the plan's operational compliance prior to being discovered by the IRS.

The best answer to these concerns is to avoid fiduciary breaches. Financial professionals can often detect the possible emergence of potential fiduciary breaches before they manifest and consult on options to avoid these breaches altogether.