# Plan Sponsors Need To Fix Their Plan Errors Now!

By Ary Rosenbaum, Esq.

For most of us, when we don't feel well, we go to the doctor. We don't wait until things get worse, we take care of things because there may be symptoms of a disease or illness that could cause greater harm to our health if we don't nip it in the bud. So it's strange when 401(k) plan sponsors are told by their plan providers that there are errors and omissions in the administration of their plan that needs to be fixed and they don't want to fix them even though they have a fiduciary duty to keep the plan in compliance with ERISA and the Internal Revenue Code. This article is as 401(k) plan sponsors, you need to fix errors and omissions in your plan before the problems grow and it gets costlier to fix.

**Plans have to be in compliance**

Let's just say that sponsoring a qualified 401(k) plan is part of a deal made with the Federal Government. By agreeing to sponsor a qualified retirement plan such as your 401(k) plan, you get favorable tax treatment on contributions you make to the plan as a tax deduction on your business income tax return and your employees get tax-deferred treatment on their salary deferral contributions (tax free treatment if they are Roth 401(k) deferrals). The part of the deal in getting the tax-favored treatment requires you to administer your plan according to the provisions of your plan document, the provisions of the Internal Revenue Code, and the provisions of ERISA. Most plan sponsors forget that part of the deal in sponsoring a 401(k) plan. You only get favorable tax treatment for you and your employees as long as you abide by the terms of your plan and the law. Any types of errors, mistakes, and omissions, means that you're not complying with the plan document and/or the law. If you discover plan errors and omissions, they have to be corrected. You can't just ignore them because if your plan is in compliance with the plan document and/or the law, you have to fix them. The reason you have to fix them is that many errors can threaten the tax qualification of your plan. For example, if you fail to restate your plan as required by law, you have a plan error that can be assessed tens of thousands of dollars in penalty and may be disqualified by the IRS. What does plan disqualification mean? It means that participants would have immediate income consequences for their plan contributions and you would lose tax deductions for previous years for contributions made to the plan. While the tax disqualification weapon is a weapon of last resort for the IRS, they have used it in the past. It might be the death penalty for retirement plans that is rarely used, but you have to identify the penalties that are out there if you decide that you aren't interested in keeping your plans in compliance.

**Fix plan errors because they won't go away on their own**

When mistakes and omissions are discovered in the administration of the 401(k) plan, the fact is that they won't just go away on their own. If you failed to properly deposit salary deferrals one payroll isn't excused by the fact that you always get them in on time. Every mistake or omission stand on their own, they aren't some crumb or piece of dirt that you can sweep under the rug. If you have a plan error in compliance testing, there is still a three-year statute of limitations based on the filing of your Form 5500 where errors and omissions can be reviewed and discovered by the Internal Revenue Service (IRS) and the Department of Labor (DOL). There are some errors like failing to file Form 5500 that have no statute of limitations where you can be penalized many years down the line. Any error and omission need to be fixed because it will continue and affect the plan, they don't just disappear on their own.

**There are voluntary correction programs designed so you can fix your errors**

Everyone may gripe about the IRS and the DOL, but there business when it comes to plan sponsors voluntarily complying with the law is making sure that plan sponsors actually voluntarily comply with the law. Regulations and law have no teeth if

the government can't go out there and make sure they're complied with enforce the retirement plan rules out there. If the IRS and DOL were only in the business of punishing plan sponsors for making mistakes, they wouldn't have created voluntary compliance programs. The IRS and DOL have created voluntary compliance programs that allow plan sponsors that have identified plan errors and omissions to fix their problems. One IRS program, in particular, the Self Correction Program (SCP) allows plan sponsors to fix small errors without even having the need to apply to the IRS for relief. Most other programs including the IRS Voluntary Compliance Program (VCP) and the DOL program, the Delinquent Filer Voluntary Compliance Program (DFVCP) and the Voluntary Fiduciary Correction Program (VFCP) require an actual submission. While legal fees and compliance fees for these programs are costly, they are far less than getting your errors and omissions discovered on audit and paying a penalty. A perfect example is the DFVCP, which deals with late filings of Form 5500. If you forget to file a Form 5500, there is no statute of limitations and the penalties for any late filing can be severe. In the case of a small plan (a plan with fewer than 100 participants) the penalty amount under the DFVCP program is $10 per day for each day the Form 5500 is late, not to exceed $750. In the case of multiple late 5500s for a plan, the maximum penalty amount is $750 for each 5500, not to exceed $1,500 per plan. In the case of a large plan (a plan that has a required audit for the 5500), the penalty amount is $10 per day for each day the Form 5500 is late, not to exceed $2,000. In the case of multiple late 5500s for a plan, the maximum penalty amount is $2,000 for each 5500, not to exceed $4,000 per plan. If you don't file a DFVCP if you have a late or missing 5500, the DOL isn't so forgiving if they find the error out before you fix it. Since everything is computerized, the DOL will eventually get to any plan sponsor that has a missing or late 5500. It may take them years, but the penalties they may charge are far greater than anything you'd have to pay under a DFVCP. Not only that, but the IRS wants its own pound of flesh for late 5500s as well. So late and missing 5500s will be subject to penalties from both the IRS and DOL. The IRS penalty for the late filing of a Form 5500 is $25 per day, up to a maximum of $15,000. The DOL penalty for late filing can run up to $1,100 per day, with no maximum. If you have multiple late 5500s, would you rather pay $1,500 or $1,000+ a day penalties with no maximum? The voluntary compliance programs by the IRS and DOL are gifts because they allow the plan sponsor to admit their mistakes and pay a smaller penalty rather than getting hammered by larger penalties if the errors are discovered on plan audit. Paying legal and voluntary compliance program fees hurt the wallet and pocketbook a lot less than the IRS and/or DOL will later down the line.

**If you don't fix your problems, your plan providers may fire you**

Third-party administrators (TPAs), financial advisors, and other retirement plan providers that are very good at what they do are also very good at fixing the problems that plan sponsors have, especially when errors are discovered when the previous TPA gets replaced. Many, if not most plan errors are discovered years later when there is a change of TPAs and the new TPA discovers issues that the previous TPA didn't catch. TPAs and other plan providers are good at detecting errors and getting the plan sponsor to fix them, but they have issues if the plan sponsor doesn't fix them. Not only do these good plan providers have a reputation to keep, they also want to make sure that they get blamed for having plans on their client list that isn't in compliance and the reason is that they don't want to get blamed later down the line. A good TPA wants to make sure all the plans they're working on are in compliance and they don't want to work on plans when the plan sponsor refuses to fix their compliance issues and errors because clients like that are usually the ones that cause the greatest headaches and end up blaming the current TPA who had nothing to do with the plan error. Good TPAs financial advisors usually wash their hands of plan sponsors that don't want to get their plans in compliance Good plan providers want good plan sponsor clients who pay their bills, they don't want someone who can't accept the responsibility of being a plan fiduciary and fixing a plan that needs to be fixed. I have had so many TPAs refer me these out of compliant plan sponsors to me and many of them never bother to contact me or retain my services, so they end up having to hire a new TPA when the current TPA fires them for not getting the plan into compliance. Like most plan providers, a good TPA has so much on the plate, they have no time for the drama of the plan sponsor that doesn't want to take care of plans from plan sponsors that don't want to get into compliance.

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