

Employee Benefits Compliance Reviews: How An Employer Should Get Started

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This article will outline the primary issues to be considered by an employer in deciding whether to proceed with a compliance review of its employee benefit plans and certain related areas of its operations. Due to the recent explosion in the number of law suits being commenced by employees which arise out of the employment relationship, the need for an employer to undertake such a review is much greater today than it was in the past. If such a review is to be undertaken, this article can be used as a preliminary checklist to help structure the review.

What Are The Objectives Of A Compliance Review?

1. To help insure that an employer's plans comply with all applicable laws on a going forward basis.
2. To review the past operations of the plans involved in order to identify areas of potential concern and decide upon the types of corrective action to be taken.
3. To identify operational inefficiencies and decide upon the types of improvements that can be made.
4. To receive substantive recommendations regarding specific plan provisions.

What Plans Should Be Covered By The Review?

1. An employer's tax qualified retirement plans (e.g., 401(k), defined benefit and ESOPs).
2. Non-qualified retirement plans, incentive, bonus and deferred compensation arrangements.
3. Health and welfare plans, including group health plans for both active employees and retirees, short and long term disability and life insurance arrangements.
4. Compensation arrangements for both employee and non-employee members of the Board of Directors.
5. Employment related areas including the employee handbook, employment and disability policies, hiring and firing procedures, compliance with COBRA, Family Leave and ADA.

What Periods Should Be Covered By The Review?

1. A basic approach would involve a "snapshot" review of the current status of an employer's plans and policies. This approach is designed to help insure compliance on a going forward basis.
2. A more detailed review would also encompass certain prior periods (e.g., three years, the year immediately following a change in an outside service

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provider, the year after a change in laws or plan provisions). This approach is designed to help assess the risks attributable to any prior problems with the plans under examination and to ultimately receive recommendations concerning the types of corrective action which could be taken.

What Is The Appropriate Scope Of The Review?

There are various levels of review that can be performed. By way of example, in determining whether distributions from an employer's tax qualified retirement plan are being handled properly, the options include:

1. A review of the preprinted distribution packages currently being used to determine whether they conform to all legal requirements and are consistent with the terms of the underlying plan documents. This would be a minimum level of review.
2. A more detailed review could also involve interviews with the employees responsible for the administration of the plan to determine whether distributions are being processed in an appropriate manner. The purpose of the interviews would be to determine whether distributions are being processed in a timely manner and in accordance with the terms of the plan documents and all other applicable legal requirements. For example, in the case of a qualified retirement plan that is subject to the provisions of the Retirement Equity Act governing lifetime distributions to plan participants, it should be verified that there is a system in place to insure that a properly executed spousal consent form is received by the plan administrator before a lump sum is paid. In the case of a defined benefit plan, another important objective of the interviews would be to determine whether there is an employee involved in the administration process who understands and reviews the data provided by the plan's actuary and confirms that distributions are being made in the appropriate amounts.
3. Review of prior distributions. This would be the most extensive review and would be designed to hope-

fully provide comfort, but potentially identify problems concerning the distributions which were previously made. As with a prior period review, this level of review should not be undertaken by an employer without first considering what it might be prepared to do in the event problems are discovered.

What Is The Form And Content Of The Report To Be Presented Upon The Conclusion Of The Review?

As with all of the other issues to be considered by an employer structuring a review of its employee benefit arrangements, there are various options available to it with regard to this item.

1. A detailed written report setting forth all of the findings and recommendations can be presented.
2. All of the findings can be presented orally at a meeting at the conclusion of the project. At such a meeting, the form of the written report to be delivered could be decided upon.
3. Ideally, upon the conclusion of the project and, as necessary, upon the employer's implementation of certain recommendations, the reviewer can deliver a "clean" report with regard to all procedures, policies, etc. currently in effect.
4. The oral or written report would be of a somewhat different nature with regard to any prior problems that are identified. With regard to any such problems (e.g., a plan participant received an improper distribution, a group health plan participant was improperly denied COBRA continuation coverage), once identified, the purpose of the report would be to set forth the potential risks involved and to make recommendations concerning the nature and potential costs of the various type of corrective action which might be available.
5. In addition to identifying areas of potential liability exposure or indicating that an item reviewed complies with the law, the report may contain suggestions for areas of further examination, evaluate employee efficiency in certain areas and make recommendations concerning substantive provisions of existing plans and policies.
6. The nature of the report depends upon various factors including the need for a detailed report in order for it to be processed through the levels of management that must deal with it, the time, effort and expense committed to the report and the concern about generating a written document that may not be completely favorable and could potentially be discoverable in litigation.

What Should Be Done With The Results?

1. The results can fall into two broad categories and are a function of the type of review undertaken by the employer. The categories are procedural and documentation problems which currently exist and need only be corrected on a prospective basis and past problems which may have prejudiced the rights

of participants or subjected the employer to potential liability exposure (e.g., retirement plan qualification issues, loss of an income tax deduction, excise tax or Department of Labor sanctions).

2. Having identified any problems with regard to an employer's plans, the report would set forth the types of corrective action that are available and would be used by the employer in deciding how to proceed.

3. If appropriate, the report could also be used by the employer to increase the efficiency of its operations and could serve as the starting point for a consideration of possible substantive changes to the plans, policies and arrangements reviewed.

How Should An Employer Get Started?

1. An employer that is considering a compliance review of its employee benefit arrangements should consider all of the items discussed above and should then decide upon its objectives as well as any particular areas of concern. After that has been done and an employer has decided how it would like to proceed, the details of the review to be undertaken would be set forth in an initial engagement letter.

2. Flexibility is appropriate in structuring the compliance review. An employer might decide that it is not necessary to review certain of the plans and arrangements mentioned above. With regard to certain other items, it may decide to review only the documents and procedures currently in use. With regard to other items, it may decide that it is also appropriate to review prior periods and transactions.

3. The review should be fluid in nature and its scope need not be permanently fixed at the inception of the project. For example, an employer might initially decide to only review the form of documents being used in connection with distributions from its retirement plan and to not look at anything concerning prior distributions. However, if deficiencies in the documents are discovered, it might then decide to expand upon the scope of the review in this area and to also review the details of certain distributions which were previously made.

In summary, all employers should consider whether it might be appropriate to undertake a compliance review of any or all of their employee benefits arrangements. In view of the ever increasing liability exposure in the employee benefits area which may arise out of participant claims as well as action taken by various governmental agencies including the Internal Revenue Service and the U. S. Department of Labor, such a review can go far in helping an employer protect itself in this area. Such a compliance review can also help an employer increase the value of the employee benefits provided by it.