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Dealing with the Aftermath of Benefit Plan Administrative Errors

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Employee benefit plans are complex to create and to administer. Benefit plan designers and fiduciaries should plan ahead to minimize the risk of mistakes to the extent possible. A good design process that takes into account the employer's business needs and important administrative considerations is the first step in creating a quality employee benefit program, and should be followed by a thorough review of plan terms. Once a plan design is in place, plan fiduciaries should also maintain systems to prevent errors when possible, and to ensure prompt identification and facilitate an appropriate response if errors do occur.

In 2010, Supreme Court Chief Justice Roberts observed that, "People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute,' and the plans that administrators must construe can be lengthy and complicated."[1] No one would dispute that the Internal Revenue Code of 1986, as amended (the Code), is at least as complex as ERISA. Furthermore, the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation all have

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issued numerous regulations and various pieces of informal guidance under these statutes, and the federal courts have filled volumes with their decisions regarding employee benefits law. Add the myriad of legal requirements to the diverse array of optional plan features and obligations created by plan sponsors when plan documents are drafted, and it is no surprise that mistakes happen more often than plan administrators would wish. With the understanding that mistakes are inevitable, plan sponsors and fiduciaries should consider the following:

- How can serious mistakes (and as many minor ones as possible) be prevented?
- How can mistakes be discovered and reported to the proper plan fiduciary or plan sponsor representative early, when they are most likely to be affordably correctable?
- How should a mistake be handled?
- How can the fiduciaries and the employer protect themselves against the consequences of a mistake?

HOW CAN MISTAKES BEST BE PREVENTED?

Plan sponsors and fiduciaries seeking to prevent mistakes should focus on preventing the types of circumstances most likely to cause them. This requires a joint effort by the management of the plan sponsor, as the entity empowered to set the plan terms; the plan fiduciaries, as the people charged with overseeing plan operations; and the employees and vendors responsible for carrying out daily plan operations.

Plan Design

As in the world outside employee benefits law, one of the best ways to prevent benefit plan mistakes is to keep things as simple as possible. For example, if an employer uses a single plan with uniform plan features for all of its US employees, it has effectively prevented mistakes arising from transfers between employment locations or employee classifications. Naturally, the virtues of simplicity need to be weighed against other factors. An employer with union and non-union employees may bargain for a different benefit package for union employees. An employer with different lines of business may find it necessary to provide an expensive benefit package in one industry in order to match market norms, while that same package might be economically unsustainable for another line of business. An employer with geographically distant facilities may need to use local health insurers with different benefit offerings. Employers facing the competing imperatives of simplicity and business needs that favor benefit plan diversity should consider their options carefully as they seek to find the proper balance between excessive complexity and overly rigid dedication to a "one size fits all" model.

The Code, in particular, favors the use of a uniform benefit design, at least as applied to employees not subject to a collective bargaining agreement.[2] Historically, this has been particularly true for qualified retirement plans and similar tax-favored retirement vehicles. For example, a qualified plan utilizing a uniform contribution or benefit accrual formula that meets certain specified requirements can avoid the need to perform complex and expensive non-discrimination testing. However, anticipated increases in non-discrimination testing obligations for group health benefits and cafeteria plans may soon increase the advantages of uniformity for these plans as well.

Forestalling the need for tests avoids the possibility of mistakes occurring in the many different phases of testing, such as identifying highly compensated employees and compiling the relevant contribution and compensation data. Furthermore, uniformity in the plan's contribution or benefit accrual structure reduces the likelihood of classifying employees under the wrong formula. Uniformity also means that only one formula needs to be set up and applied to the data, and increases the odds that the calculation process can be successfully automated to remove the risk of manual error. If an employer nonetheless decides to offer different benefit designs to different groups of employees, the plan's administrative staff will need sufficient quality control measures in place to compensate for the higher risk of error.

Beyond general questions of broad plan design, the plan sponsor should also carefully consider the merits of including error-prone plan features. Plan loans, for example, are a common source of mistakes. In fact, plan loan errors are sufficiently frequent that the IRS offers a special fee structure and pre-approved correction process under its Voluntary Correction Program just for correction of plan loans.[3] As another example, offering an annuity distribution option under a plan not otherwise required to offer this type of payment can add a great deal of complexity to distribution administration, and puts the plan at risk of needing to make payment to a spouse despite having made full payment to a participant, if valid spousal consent is not obtained. While there may be other factors that favor the inclusion of these or other plan features despite their added complexity, the employer should take the logistical considerations into account when making plan design decisions, and plan fiduciaries should bear in mind that such features require additional oversight.

Ultimately, a robust review process should surround the establishment or amendment of an employee benefit plan, especially a retirement plan. Too often, sponsors simply sign the plan document or insurance contract prepared by a plan vendor without considering whether its features meet their needs or comply with legal requirements. An employer may not even read the document to confirm that the vendor drafted the plan or contract in accordance with the specifications provided by the employer. Such inattention can have drastic consequences. Mistakes are common when creating new plan documents, and can be difficult and expensive to fix. For example, if the employer believes the plan requires an employee to complete a year of service to participate, but the plan document does not include this restriction, the employer may be liable for retroactive contributions for all the employees wrongly excluded. More dramatically, Verizon recently found itself facing a $1 billion lawsuit due to a drafting error.[4] Both the district and circuit courts expressed surprise that such a large corporation, re-designing such an important plan, used a drafting process that allowed the error to slip through. Fortunately for Verizon, the courts nonetheless concluded that the negligence was not sufficient to bar reformation of the plan when considered in light of Verizon's extensive documentation trail regarding its intentions and its accurate participant communications.

Therefore, when establishing a new plan or amending an existing one, a senior employee familiar with the employer's intentions and business needs should review the document carefully, and be sure that he or she understands all the plan terms.[5] Particularly in the case of a retirement plan, the document also should be prepared or reviewed by an attorney familiar with employee benefit plans. While no review process is foolproof, a robust process will prevent many common plan design errors, and will promote accurate plan operations by creating familiarity with plan terms.

Plan Operations

A plan fiduciary must be familiar with the terms of the plan since ERISA requires that the fiduciary act in accordance with plan terms.[6] A plan fiduciary also must discharge his or her duties to the plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[7] Of most relevance to the goal of mistake prevention, this standard of conduct requires a plan fiduciary to use appropriate care in performing his or her responsibilities and in selecting and retaining vendors who perform tasks on the fiduciary's behalf.

A prudent fiduciary must possess or hire the necessary expertise and equipment to perform his or her duties. For example, companies commonly employ a professional recordkeeper to keep track of retirement plan benefits and account balances, facilitate investment trades (in the case of participant-directed retirement plans), and pay distributions. Likewise, companies that operate self-insured health plans do not attempt to administer benefit claims, decide what constitutes "experimental treatment" or "usual, customary and reasonable" rates, or otherwise delve into the details of plan operations. Instead, a self-insured employer hires a professional health plan administrator that can offer a call center and plan Web site and which has access to the necessary databases and medical expertise.

Reliance on reputable outside vendors can prevent various types of mistakes. A benefits consulting firm with quality software and experienced employees is less likely to make a mistake when conducting nondiscrimination testing than is the chief financial officer of a small company trying to do the plan's testing on his or her own. On the other hand, many mistakes happen because plan fiduciaries do not adequately oversee their chosen vendors, or do not pay adequate attention to communications from them. A fiduciary may not review the signature-ready Form 5500 waiting on the provider's Web site for upload to EFAST2 to confirm its accuracy before filing it, or may not be aware that the vendor's call center employees have been poorly trained and are regularly providing misinformation about the plan's terms. Mistakes may also happen because the vendor and the plan sponsor's employees fail to understand each other properly.

Accordingly, it is essential that the plan sponsor's employees charged with overseeing the plan do not fall asleep at the switch, as the saying goes. They cannot simply hire a vendor and assume that the plan will thereafter operate properly. Lately, plan fiduciaries' alleged failure to monitor plan vendors' compensation and ensure that it does not exceed reasonable margins has received a great deal of attention,[8] but the quality of the service provided by the vendor is at least as important as what the vendor gets paid. While paying a much larger fee for slightly better or slightly more comprehensive service may be inappropriate, paying a cut-rate price for poor-quality service that jeopardizes the proper operation of the plan is even worse.[9]

Therefore, plan fiduciaries should devote the time to ensure the right vendor is selected, and if necessary seek professional advice to evaluate the candidates appropriately. Plan fiduciaries should communicate expectations regarding vendor performance in writing, review the quality control statistics regularly, conduct periodic audits, and revisit the standards themselves as warranted, in order to confirm the vendor's continued competent performance. For example, a fiduciary hiring a retirement plan recordkeeper might set parameters regarding training for vendor employees, documentation of administrative processes, and the nature and frequency of monitoring of call center or email responses to participant inquiries.

Furthermore, the plan fiduciary should be sure that its own house is in order. In most cases, the plan sponsor's own employees will be responsible for providing the vendor with information on newly hired or newly eligible employees, compensation data, hire and termination dates, and other essential input. Those employees must understand the plan's terms and the scope of their responsibilities in order for the plan to function properly. For instance, the IRS has identified misapplication of a plan's definition of compensation as one of the most common retirement plan errors.[10] Proper training of new employees and periodic refresher training sessions with experienced employees, along with in-depth review of any new or amended plan provisions, will help to prevent avoidable administrative errors.

Finally, the plan fiduciary must review all plan communications carefully. Numerous federal claims have arisen because plan communications did not describe plan benefits accurately.[11] A disclaimer stating that the plan document controls in the event of any conflict with the plan communication materials is no substitute for careful review by the plan fiduciary, and may not be enforceable.[12] Particularly for important plan communications, such as a summary plan description, the plan fiduciary should also have the communication reviewed by an attorney familiar with both the plan terms and the legal requirements applicable to the relevant type of communication.

For communications that the fiduciary cannot directly control, such as verbal interaction between call center employees or human resources representatives and plan participants, the fiduciary still can take measures to minimize the risk of mistakes. Training in-house personnel and insisting that vendors provide quality training for their staff reduces the risk that authorized plan representatives will provide inaccurate information. Plan fiduciaries should also ensure that managers, human resources personnel, and anyone else who is likely to receive inquiries from other employees receive regular reminders not to answer benefit plan questions unless they have been trained to do so. Frequent communication with employees about the proper points of contact for benefit plan questions likewise mitigates the risk of ill-informed company representatives providing inaccurate information, but also makes proper training of the identified contact people particularly important.[13]

HOW CAN MISTAKES BE IDENTIFIED?

Sometimes mistakes come out of the woodwork, perhaps as a result of an employee complaint or a chance remark about plan processes to someone who then identifies the statement as erroneous. In other cases, mistakes are identified as a result of the plan's routine quality control process, the plan's annual audit or a special compliance audit, or a government investigation.

It usually is best for everyone concerned if a mistake is caught as part of a routine quality control check. That frequently means that the mistake is caught early, when it is likely to be as cheap and easy to fix as it ever will be, and when it is less likely to affect multiple participants. In most cases, it also maximizes the employer's options for dealing with the mistake. An employer that has identified a mistake, corrected it, and notified (and perhaps settled with) affected participants is less likely to face a class action lawsuit, and often is in a better position to address the matter if it is raised by a government official on audit.

Accordingly, a robust quality control process pays dividends. A quality control process may include steps such as:

- Spot-checking each batch of participant statements;
- Comparing a sample list of participant payments against the plan's account balance or benefit accrual records;
- Comparing a sample list of participant vesting percentages against the plan's and employer's service records;
- Monitoring a sample of call center interactions;
- Maintaining and regularly reviewing an annual list of legal deadlines and required communications;
- Verifying that employee contributions and plan loan repayments are remitted promptly and on a consistent schedule each payroll period; and
- Keeping records of the reasons for any unusual delays.

Often, the internal quality control process will duplicate some aspects of the plan's annual audit if one is required. Neither of these processes, however, is a substitute for the other. ERISA requires that retirement plans and funded welfare benefit plans undergo an annual audit in each case if the plan had 100 or more participants at the beginning of the plan year.[14] This requirement cannot be satisfied by internal audit controls. However, the auditors review the plan once a year, and lack the plan fiduciaries' familiarity with its day-to-day operations and the employer's design intentions. They also focus primarily on the plan's assets and its compliance with certain requirements of the Code and ERISA that must be addressed by the plan's annual report, and generally do not conduct a full-scale compliance review. Accordingly, their review is no substitute for careful, real-time oversight by plan fiduciaries. A plan fiduciary who identifies errors shortly after they occur and can inform the auditors that those errors were already addressed is not only more likely to expedite a successful conclusion to the annual audit, he or she is also more likely to be able to make a quick and cost-effective correction.

Some plans, particularly large plans, periodically hire a consultant to conduct a compliance audit. A compliance audit typically involves review of a sampling of the various aspects of plan administration, in order to identify deviations from plan terms or legal requirements. As with any audit, there is no guarantee that all errors will be identified, but this process hopefully will identify any systemic issues. An audit of this type generally should be conducted at the direction and under the oversight of the employer's counsel since it poses the risk of identifying problems that may be expensive to fix.

To get the most out of routine quality control, the annual audit, or a comprehensive compliance audit, the plan fiduciary must focus on maintaining collegial relationships and open communication with coworkers and vendors. Employees and vendors must feel comfortable enough to be honest with the auditors and to bring any issues identified to the fiduciary's attention rather than attempting to cover up a mistake. When it comes to benefit plan errors, ignoring a mistake is a risky course of action.

HOW SHOULD A MISTAKE BE HANDLED?

The best way to handle a mistake depends on many different factors:

- The nature of the mistake;
- When it is identified;
- How it is identified;
- The type of plan at issue; and
- The cost of rectifying the error.

In deciding the best path forward, the plan's sponsor and fiduciaries should consider their options carefully and consult with counsel for specific advice about their obligations and options.

Government Correction Programs

The IRS and the DOL both maintain correction programs for certain types of problems. The IRS's Employee Plans Compliance Resolution System (EPCRS) for qualified retirement plans is the more comprehensive of these programs, while the DOL offers programs targeted to specific types of problems. Nonqualified plans, which are beyond the scope of this article but which present potentially significant correction issues and liabilities of their own, are covered by more limited IRS correction procedures governed by separate guidance. If a situation arises that falls within the scope of one of the corrective programs, the plan sponsor and fiduciaries should consider taking advantage of the relevant program.

EPCRS

Revenue Procedure 2013-12 contains the current set of rules, guidelines, and application fees for EPCRS.[15] EPCRS allows an employer to correct most operational problems involving retirement plans covered by the program, generally qualified plans, Section 403(b) plans, SEPs, and SIMPLEs that meet specified requirements. Governmental 457(b) plans may be able to correct issues in a similar fashion outside the official EPCRS program. Operational failures often corrected through EPCRS include:

- Failure to allow eligible employees to contribute;
- Inclusion of ineligible employees;
- Nondiscrimination testing errors;
- Impermissible or excessive distributions; and
- Miscalculation of contributions.

In more limited circumstances, the program also accommodates correction of a plan document. Failure to amend the plan document to comply with legal changes often can be corrected under a special reduced-cost EPCRS process, although a full application may be necessary if the amendment deadline was before a certain point in time or if other problems are involved.[16] In contrast, the IRS maintains that EPCRS does not permit correction of so-called scrivener's errors, which involve a plan document that does not reflect the employer's intended plan design. Despite this stance, the IRS has allowed retroactive amendments to conform plan documents to actual operations in some cases, generally when there was no adverse impact on plan participants, or if the change would be consistent with plan participants' expectations and the employer's original intentions.[17]

For example, the IRS might permit an employer which had treated all employees as fully vested to amend its plan to remove a vesting schedule retroactively, thereby conforming the plan's terms to its more generous operation. In the case of an employer that unwittingly sponsored a plan which by its terms covered all employees in its related group of businesses but had in fact offered that plan only to some employees and offered a different plan to other employees, the IRS may even allow the employer to amend the plans retroactively to reflect their actual coverage, if the circumstances indicate that doing so would be consistent with everyone's expectations.[18]

EPCRS allows a plan sponsor to correct operational errors and a couple of specified document errors without IRS approval at any time if the errors qualify as "insignificant." The plan sponsor can correct "significant" operational errors or document errors that fall into the specified categories until the end of the second plan year after the plan year of the error, with an extended deadline available in some cases. Outside of these situations, the plan sponsor generally must request IRS approval of its proposed corrections. If the plan is not "under examination" (generally, a Form 5500 audit, an exempt organizations audit of the sponsor, or an investigation by the IRS's Criminal Investigation Division), it can pay a specified fee and request this approval on a voluntary basis. Correction in the context of an IRS examination generally involves the use of Audit CAP, and payment of a higher penalty.[19] Accordingly, an employer that learns of an error soon after it occurs and before it has gotten expensive or affected numerous participants is in the best position to fix the error without IRS involvement, or at the cost of only the VCP fee in addition to any expense of the correction itself.

Correction under EPCRS protects an employer against further enforcement action by the IRS as a result of the corrected error, although it does not provide a guarantee against action by a plan participant. In many cases, EPCRS correction constitutes the best course of action. If an employer simply ignores an error which is later discovered by an IRS auditor, the employer will have less leverage to negotiate a desirable correction.

Department of Labor

The DOL maintains two correction programs. The Delinquent Filer Voluntary Compliance Program (DFVCP) allows ERISA plan administrators who have omitted to file Form 5500 for one or more years to bring their filings up to date in exchange for payment of a fixed penalty, so long as they do so before receiving a notice of non-compliance from the DOL.[20] The Voluntary Fiduciary Correction Program (VFCP) allows plan fiduciaries to correct certain breaches of fiduciary duty.[21]

DFVCP

With a maximum per-plan penalty of $4,000 ($1,500 for "small plan" filers and $750 for "small plans" sponsored by a Section 501(c)(3) organization) if multiple forms were missed, and $2,000 ($750 for "small plan" filers) if only one year's form is at issue, DFVCP is almost always financially advisable. Non-DFVCP DOL penalties typically can be up to $300 per day, subject to a $30,000 annual cap, with the DOL empowered to assess penalties of up to $1,100 per day in appropriate cases, and separate penalties assessable by the IRS.

As an alternative to using DFVCP, or if the plan administrator is ineligible for DFVCP, the plan administrator can request a waiver or reduction of the penalty on the grounds that the failure to file was due to reasonable cause. This waiver or reduction is at the discretion of the DOL or the IRS, depending on which agency has assessed the penalty. Such a request is more likely to meet with a favorable response if the plan can indicate that it generally maintains good compliance policies and simply experienced an understandable, isolated glitch. If the problem was identified due to a notice from the DOL, a prompt and honest response generally is important to negotiating a favorable resolution.

Careful fiduciary oversight helps to ensure Form 5500 will be timely filed or, if it is not, that any failure will be promptly identified for cost-effective correction through DFVCP. In the worst-case scenario of a DOL notice of non-compliance, demonstration of overall competence and legal compliance in plan administration is the best way to maximize the chances of a favorable resolution.

VFCP

In contrast to the broad sweep of EPCRS, VFCP is only available to correct a transaction that fits into one of the 19 categories listed in the DOL notice that governs the program. Other types of fiduciary violations cannot be corrected using VFCP. A number of the situations are unlikely to arise in connection with a typical participant-directed 401(k) plan operated through a professional recordkeeper. For example, such a plan typically would not be buying or selling illiquid assets. Many plans, however, are familiar with the program's rules for correcting late remittance of employee contributions and loan repayments.

Late remittance of employee contributions and plan loan repayments is a major enforcement focus for the DOL.[22] Late remittance must be disclosed on Form 5500 for any plan required to file a Schedule H or Schedule I, and the form must also indicate whether an appropriate correction has been made. The DOL has been making an effort to encourage the use of VFCP for late remittances, and an exemption from the excise tax applicable to late remittances is available in some cases. Nonetheless, in light of the small amounts usually involved, many employers conclude that a formal filing is not cost effective. Others are unable to file because the DOL identifies the late remittance on audit, making voluntary correction unavailable. Regardless of whether a formal filing is made, acting promptly to deposit any late contributions and contribute missed earnings minimizes the cost of a failure to remit contributions on time. Accordingly, the VFCP principles are applicable even if the employer does not utilize the VFCP.

Participant Claims

A participant or beneficiary has the right to bring a claim even if the employer has resolved a problem to the government's satisfaction through EPCRS or VFCP. In *Cross v. Bragg*,[23] the employer obtained IRS approval to amend its plan retroactively to correct a drafting error, but the Fourth Circuit held that such a reformation could be accomplished only by a federal court. The Fourth Circuit also held that reformation was not warranted in that case, and that the plaintiffs were entitled to benefits under the plan as originally drafted.

A participant or beneficiary may complain of a failure to implement a contribution or investment election, receipt of incorrect information regarding the amount or availability of benefits, impermissibility of an amendment, or some other issue that arises with respect to plan operations. Once again, the best way to resolve the problem depends on the specific facts and circumstances.

Provision of erroneous or incomplete information regarding plan benefits is a common cause of litigation.[24] For example, numerous participants and providers have sued health plans and their administrators due to refusals to pay for procedures or products despite pre-approval of the associated expenses.[25] In *Griggs v. E.I. DuPont De Nemours & Co.*,[26] a participant successfully asserted that a breach of fiduciary duty had occurred when the employer provided incorrect information regarding the tax treatment of pension plan benefits, and failed to update that information when it learned of its error. In the long-running case that culminated in the *Conkright v. Frommert* decision,[27] participants asserted that a summary plan description did not provide adequate information about how a prior distribution would affect benefit calculations for subsequent service. In *Christensen v. Qwest Pension Plan*,[28] the participant sued after the plan's actuary provided an inaccurate benefit estimate.

As these examples make clear, misrepresentations can arise in a variety of situations for a variety of reasons, even leaving aside cases involving deliberate wrongdoing.[29] When it comes to the consequences of erroneous benefit plan information, court decisions are equally varied. For example, in *Smith v. Medical Benefit Administrators Group, Inc.*,[30] the court ruled that a participant was not entitled to coverage for gastric bypass surgery, even though the procedure had been erroneously preapproved. In *The Oak Brook Surgical Centre, Inc. v. Aetna, Inc.*, a court permitted state law negligent misrepresentation claims to proceed in a similar situation, objecting to "Aetna's insistence that it can make whatever representations it desires with impunity because ERISA shields it from liability."[31] The court in *Christensen v. Qwest Pension Plan*, discussed above, found that Mr. Christensen, who received an erroneous benefit estimate, was not entitled to any compensation or other relief as a result of the error, while a different court found that a participant who had been given inaccurate information about his pension benefit on multiple occasions could pursue a claim for equitable estoppel against the fiduciaries of the plan in question.[32] The Supreme Court's recent *CIGNA Corp. v. Amara* decision may enhance the ability of participants to obtain relief in those cases in which a misrepresentation itself was the actual cause of harm.[33]

General Principles for Handling Mistakes

Given the uncertainty of available remedies added to the financial and administrative costs of litigation, as well as the adverse effect of a mistake on the affected participants and the employee relations damage that can result when a participant is harmed by a plan or employer's error, fiduciaries and employers often want to resolve mistakes in an amicable manner, rather than defending against the consequences of an error to the full extent of the law. Likewise, cases like *Christensen* provide an incentive even for innocent participants wronged by an undeniable error to work matters out with the plan sponsor and fiduciaries rather than gambling on ERISA's sometimes drastically limited array of remedies. For a fiduciary hoping to reach a mutually acceptable solution, addressing an assertion of error promptly and in a straightforward fashion usually is the best way to prevent the matter from escalating. At the least, all participant and beneficiary claims should be handled in accordance with the plan's claims and appeals process.[34]

Many problems can be cleared up by a prompt, informative, and courteous response from the plan fiduciary and perhaps a moderate payment. Corrective payments generally must be made by the employer, not the plan, but in some cases the plan may be able to cover the liability. For example, the employer might be able to make a conforming amendment to the plan document to provide additional benefits under the plan, or the employer might determine that it owes an additional contribution to the plan which permissibly can be covered by existing funds in the plan's forfeiture account. Alternatively, the dispute might involve a bona fide difference of opinion regarding plan terms that can legitimately be settled by the plan.[35]

Even if a case appears simple and inexpensive, however, prompt consultation with counsel about the employer and plan's obligations and options can save a great deal of time and expense later. In the first instance, counsel can assist the employer and fiduciaries in reaching an accurate assessment of the impact of the mistake. Such an assessment should precede any apology for the underlying error, to make sure that the employer is not admitting to more than it can afford to resolve.[36] As the dispute proceeds, counsel can ensure that claims are handled in accordance with proper claims procedures and that the record is developed in a manner that will best position the plan fiduciaries to defend their decision in court if that becomes necessary. Finally, counsel can work with the employer and fiduciaries to ensure that the claimant provides an appropriate release if a matter is settled.

Accurate assessment of a claim may require investigation, and that may take time. Keeping in touch with the plan participant during that process and completing the investigation in a timely fashion may prevent a participant from determining that he or she needs to escalate a matter to the DOL or a court. In the event that the plan determines that in fact an error did not occur, a participant who has received courteous and responsive handling also is more likely to accept that answer than one who has become convinced of the plan and employer's hostile intentions. Conversely, delay or obfuscation can result in a minor matter becoming a major lawsuit if the participant gets frustrated. For example, if a participant believes he or she was underpaid and requests the plan document, failure to respond within 30 days can result in penalties of up to $110 a day, as well as potential liability with respect to the participant's original claim and legal fees.[37]

Even if an issue with a complaining participant is successfully resolved, the employer and plan fiduciary should not lose track of the bigger picture. Depending on the error, a corrective filing with the IRS pursuant to EPCRS and/or the DOL through VFCP might be warranted to protect the plan as a whole and its fiduciaries. The plan fiduciary should review the plan's procedures and make any changes appropriate to minimize the chance of a similar error recurring, and may need to reach out to additional plan participants pursuant to an EPCRS correction or in order to comply with his or her general fiduciary obligations. In this regard, the fiduciary must remember that while the employer might have a financial interest in minimizing the cost of correction, the fiduciary's obligation is to the affected plan participants and beneficiaries.

Some errors, however, may be too large or expensive for self-correction to be feasible. For example, a drafting error could have cost Verizon an additional $1 billion in pension liabilities, if not for a successful bid for judicial reformation of the plan document.[38] In those circumstances, timely consultation with counsel is essential.

HOW CAN PLAN SPONSORS AND FIDUCIARIES PROTECT THEMSELVES?

In the benefit plan context, an ounce of prevention truly is worth a pound of cure. Since occasional mistakes are nonetheless as inevitable as death or taxes, an employer should make sure to have appropriate fiduciary liability insurance in place, and to be familiar with its notice requirements and coverage limitations. The insurance policy should be reviewed periodically to be sure that coverage limits remain appropriate and to keep the list of covered plans, businesses, and fiduciaries up to date. If a policy is discontinued, the employer should be sure it understands its rights under the discontinued policy (and any "tail" coverage purchased) and under its new policy with respect to claims based on previous errors.

The employer and plan fiduciaries also should be sure they understand the indemnity clauses in their vendor contracts, and the limitations on the vendors' indemnity obligations. If a vendor relationship terminates, the employer and plan fiduciaries should be sure to build in appropriate transition assistance, to obtain any information in the vendor's possession that they may need in the future, and to understand the extent to which indemnity obligations continue after termination.

Some cynics might suggest that not maintaining an employee benefit plan is the best way to protect against the consequences of employee benefits mistakes. However, that is not always the case.[39] Furthermore, even conceding some merit to the viewpoint that avoidance of plan sponsorship avoids the bulk of employee benefits risks as well as the costs of the programs themselves, there is a different type of cost to operating a business without benefits. Employee benefits can be a valuable recruitment and retention tool if employees understand and appreciate the programs and are happy with the service they receive. Committing the necessary resources upfront to arrange for a plan design suitable for the employer's needs, good training of plan personnel, selection of quality vendors, and a thoughtful plan communications program are the best ways to prevent mistakes and to avoid significant adverse consequences when they do occur. Quality plan operation, in turn, will best achieve the employer's goal of employee satisfaction.

NOTES

1. Conkright v. Frommert, 130 S. Ct. 1640, 1644; 176 L. Ed. 2d 469, 473 (U.S. 2010) (internal citations omitted).

2. Collectively bargained employees are exempt from many of the non-discrimination rules. *See, e.g.,* IRC §§ 410(b)(3)(A), 401(a)(4).

3. Rev. Proc. 2013-12, §§ 6.07, 12.02(3).

4. Young v. Verizon's Bell Atlantic Cash Balance Plan, 667 F. Supp. 2d 850 (N.D. Ill. 2009), *aff'd* 615 F.3d 808 (7th Cir. Ill. 2010), *cert. den.* 179 L. Ed. 2d 1245 (2011). *Cf.* Cross v. Bragg, 47 Employee Benefits Cas. (BNA) 1784 (4th Cir. 2009).

5. Reviewing the summary plan description (SPD) or summary of material modifications (SMM) associated with the new or amended document provides a valuable safety net against plan document errors as well since the plan sponsor may be better able to identify errors in plan terms when expressed in the simpler format of a participant communication. However, reviewing the SPD or SMM is no substitute for

reviewing the actual plan document, since an error may exist in the plan document without being reflected in the SPD or SMM. *See, e.g., Young*, *supra*, n.4.

6. ERISA § 404(a)(1)(D).

7. ERISA § 404(a)(1)(B).

8. *See, e.g.,* George v. Kraft Foods Global, Inc., 641 F.3d 786 (7th Cir. 2011); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009); 29 C.F.R. § 2550.404a-5 (establishing specific requirements for disclosure to participants in participant-directed plans); 29 C.F.R. § 2550.408b-2(c) (requiring certain plan service providers to provide detailed compensation disclosures to plan fiduciaries).

9. *See George*, *supra*, n.8 (concluding that fiduciaries in the case had not made a reasoned decision that advantages of trading structure outweighed costs, but acknowledging that fiduciaries could consider benefits as well as costs in making a decision). In addition, the DOL's regulations regarding participant fee disclosures specifically require that participants be informed that fees are only one factor to consider when making investment decisions. 29 C.F.R. § 2550.404a-5(d)(1)(iv)(4).

10. EP Compliance Trends and Tips - Compliance Activities - Applicable Issues - The Employer Contributions (visited June 15, 2012) *<http://www.irs.gov/retirement/article/0, id=148122,00.html>*.

11. *See, e.g.,* Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162 (9th Cir. 2012) (plaintiffs sued due to deficient SPD; court ruled in favor of employer on facts of case since plaintiffs could not show detrimental reliance and accordingly had no estoppel claim); Burke v. Kodak Ret. Income Plan, 336 F.3d 103 (2d Cir. 2003) (spouse could seek survivor benefits as a domestic partner when SPD failed to explain interplay between domestic partner benefits and one-year marriage rule for spouse, thus depriving participant and spouse of notice that they should file an affidavit of domestic partnership; SPD indicated that an appeal "should" be filed within 90 days of benefit denial and not that it "must" be filed by then); Heidgerd v. Olin Corp., 906 F.2d 903 (2d Cir. 1990) (provisions of SPD conflicted with plan document regarding post-acquisition severance eligibility). *See also* CIGNA Corp. v. Amara, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011) (Court found communications actively misleading, not merely erroneous).

12. The Supreme Court's CIGNA Corp. v. Amara decision, *supra*, n.11, has overruled the long-standing widespread practice of automatically deeming a conflicting SPD to control over a plan document when doing so would favor plan participants. *See Skinner, supra*, n.11. However, CIGNA explicitly authorized relief for misleading communications in appropriate circumstances.

13. *See, e.g.,* Kenseth v. Dean Health Plan, Inc., 610 F.3d 452, 470–471 (7th Cir. 2010) (errors occur in benefit plan administration and such errors do not automatically support claim for breach of fiduciary duty, but fiduciary has a duty to take reasonable steps in furtherance of right to complete and accurate information); Winkelspecht v. Gustave A. Larson Co., 52 Employee Benefits Cas. (BNA) 2220 (E.D. Wis. 2012) (summary judgment granted on plaintiff's estoppel claim against plan and employer after misinformation by benefits representative; court noted that "Ms. Raebel, as the Administrator of Payroll and Benefits for GALCO at the time, was the person GALCO employees were to go to for answers to questions about their benefits. At all relevant times, she was acting on behalf of the Plan administrator.").

14. Qualified retirement plans and funded welfare benefit plans with 100 or more participants at the beginning of the plan year must conduct an annual audit. ERISA § 103(a)(3)(A); 29 C.F.R. § 2520.104-46 (detailing audit exemption for plans with fewer than 100 participants).

15. Released as this article was in preparation for publication, Rev. Proc. 2013-12 is similar in most substantive respects to its predecessor, Rev. Proc. 2008-50. However, Rev. Proc. 2013-12 provides for a more streamlined submission process, including use of official IRS forms, expands EPCRS to cover Section 403(b) plans in a manner generally similar to 401(k) plans, and makes some other notable changes. The IRS's list of changes is available in Section 2 of Rev. Proc. 2013-12, and the IRS has posted a summary on its Web site. Chart of Significant Changes (visited Jan. 8, 2013) <*http://www.irs.gov/pub/irs-tege/rp13_12_changes_chart.pdf* >.

16. The deadline for use of the reduced-price option often depends on the plan's remedial amendment cycle. Individually designed plans are assigned to one of five remedial amendment cycles based on the plan sponsor's EIN, while plans using pre-approved documents usually are on a uniform six-year cycle. If a required amendment is not adopted prior to the plan's first on-cycle year following the amendment deadline, full-price payment may be required, with a half-price filing fee potentially available within the first year after the remedial amendment period applicable to the amendment expires, and a reduced-price filing option potentially available within the first three months following non-adoption of an amendment required by a determination letter. If a submission covers other problems, the reduced non-amender fee schedule is not available.

17. *See* Olsen, F, "Plan Amendments Generally OK in Correcting Failures After Acquisitions, IRS Official Says," *Daily Tax Report*, Mar. 18, 2011, at G-3 (IRS coordinator for employee plans voluntary compliance says the IRS will allow amendments in appropriate circumstances to correct failure to follow the terms of a plan, but "does not recognize scrivener's errors."); "IRS Reconsidering its Position on Scrivener's Error," *Tax Management Compensation Planning Journal*, 269 (2010) (IRS does not recognize scrivener's error, but reconsidering this position in light of Seventh Circuit case; IRS has occasionally allowed retroactive amendments if it was reasonably clear a drafting error was made and participants did not have reasonable expectation of benefits); *but see Cross*, *supra*, n.4 (reformation to correct plan drafting error requires approval by court, not IRS).

18. *See* Olsen, *supra*, n.17. (IRS official noted that sponsor would need to show employees who were not covered had no expectation of coverage under the plan and that the employer clearly intended to limit the coverage of the plan).

19. *See* Rev. Proc. 2013-12, *supra*, n.3, (describing VCP and Audit CAP sanction calculations); Parker, R, Chapter 5: A Guide to Determination Audit CAP at. 5–10 (visited June 15, 2012) <*http://www.irs.gov/pub/irs-tege/epchd504.pdf*> ("except in rare and unusual circumstances," Audit CAP will be greater than VCP).

20. The most recent incarnation of the Delinquent Filer Voluntary Compliance Program (DFVCP) was published in a notice included in the *Federal Register* on January 29, 2013. The DOL indicated in that notice that it would make ongoing minor updates to the program via its Web site. It is important to note that under the current version of DFVCP, as in the past, only plans which are subject to ERISA are eligible. Administrators of plans which are not subject to ERISA are not eligible, even if they have Form 5500 filing obligations under the Code. However, an ERISA-governed plan which has received a penalty notice from the IRS historically has been treated as still eligible for relief from that penalty by filing under DFVCP, so long as it has not also received a penalty notice from the DOL. The IRS indicated in the 2013 notice that it "expects to issue guidance" regarding penalty relief for DFVCP filers under the Code, and has separately commented that it is looking into establishing a similar program for non-ERISA plans. Late filing of Schedule 8955-SSA is not covered by DFVCP; failure to file either Form 8955-SSA or Schedule SSA (for plan years prior to 2009) must be addressed with the IRS.

21. 71 *Fed. Reg*. 20, 262 (April 19, 2006).

22. *See* Employee Contributions Initiative (visited June 15, 2012) <*http://www.dol.gov/ebsa/newsroom/ECI/main.html*>.

23. *See* Cross, *supra*, n.4.

24. *See, e.g.,* cases listed *supra*, n.11, in addition to those discussed in this section.

25. *See, e.g.,* Smith v. Medical Benefit Adm'rs Group, Inc., Case No. 09-C-538, 2012 U.S. Dist. LEXIS 54913 (E.D. Wis. Apr. 19, 2012); Broad Street Surgical Ctr., LLC v. UnitedHealth Group, Inc., Civil No. 11-2775 (JBS/JS), 2012 U.S. Dist. LEXIS 30466 (D.N.J. Mar. 6, 2012).

26. 237 F.3d 371 (4th Cir. 2001).

27. *See Conkright*, *supra* n.1.

28. 376 F. Supp. 2d 934 (D. Neb. 2005), *aff'd* 462 F.3d 913 (8th Cir. 2006).

29. *See, e.g., CIGNA*, *supra*, n.11 (communications found to be actively misleading); Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996) (employer deliberately misled employees regarding prospects of new subsidiary and implications for their benefit plans).

30. *Smith*, *supra,* n.25.

31. 52 Employee Benefits Cas. (BNA) 2229 (N.D. Ill. 2012) (allowing state law claims to proceed; collecting cases for and against). *See also Broad Street Surgery Center*, *supra*, n.25.

32. Guerra-Delgado v. Popular, Inc., Civil No. 11-1535 (JAF), 2012 U.S. Dist. LEXIS 44432 (D. P.R. Mar. 29, 2012).

33. *See, e.g.,id*. (employee could pursue estoppel claim based on allegation of detrimental reliance); *cf*. *Skinner*, *supra*, n.11, (employees could not demonstrate reliance on misrepresentation, and hence could not demonstrate required element of estoppel claim in this particular case; mere fact of inadequate SPD not sufficient for relief.)

34. DesMarteau, LE, "The Best Defense is a Good Offense: Handling Benefit Claims in a Fair and Efficient Manner," *Benefits Law Journal*, 22(4): 6 (Winter 2009).

35. Settlements involving a plan may need to comply with Prohibited Transaction Exemption 2003-39, 68 *Fed. Reg*. 75,632 (Dec. 31, 2003), amended 75 *Fed. Reg*. 33,830 (June 15, 2010).

36. Counsel, the employer, and plan fiduciaries should be cognizant on the potential limitations on attorney-client privilege and the work-product doctrine that can apply in the ERISA context. *See generally* DesMarteau, LE, "Employee Benefits Exceptions to Attorney-Client Confidentiality (and the Exceptions to the Exceptions)," *Benefits Law Journal*, 23(3): 6 (Autumn 2010).

37. *See* ERISA §§ 502(c)(1) and (g).

38. *Young*, *supra*, n.4.

39. *See, e.g.,* Collins v. Ralston Purina Co., 147 F.3d 592 (7th Cir. 1998) (retention agreement found to be an ERISA plan, though employer prevailed on the merits); Crespo v. Candela Laser Corp., 780 F. Supp. 866 (D. Mass. 1992) (court not convinced that severance arrangement was an ERISA plan; employer could not claim ERISA preemption and must litigate in state court).