



**Law Office of
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**Current Legal Concerns for 401(k) and 403(b)
Plans: How to Help Your Clients Avoid Liability**

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Common Issues

- Update plan document: legally-required amendments vs. discretionary amendments (draft and sign timely)
- Follow plan document's provisions!
- Apply definition(s) of "Compensation" properly
- Employer contributions: allocate to proper group of employees, and apply formulas correctly
- Compliance testing: ADP, ACP, universal availability
- Timely provide employees with opportunity to contribute
- Limit contributions, per annual IRS guidance



Common Issues

- Send employees' contributions to the plan in a timely manner: small plans vs. large plans
- Participant loans: dollar limit, and repayment terms
- Hardship distributions: dollar limit, and proper supporting documentation
- Top-heavy plans: required contribution
- Timely file Form 5500 (plan's annual tax return)



Addressing Plan Issues

- Good news!
- IRS's Employee Plans Compliance Resolution System ("EPCRS")
 - Consists of three correction programs:
 - Self-Correction Program
 - Voluntary Correction Program
 - Audit Closing Agreement Program
 - Types of plans covered:
 - Qualified plans under Code section 401(a)
 - Code section 403(a) qualified annuity plans
 - Code section 403(b) plans
 - SEPs and SARSEPs under Code section 408(k)
 - SIMPLE IRAs under Code section 408(p)



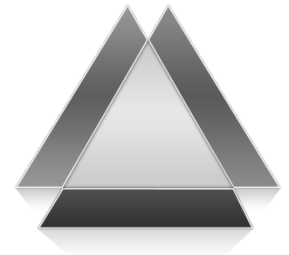
Addressing Plan Issues

- Delinquent Filer Voluntary Compliance Program (“DFVCP”)
 - For late filing of a plan’s annual tax return (Form 5500)
 - Eligibility:
 - Required filings under the DFVCP must be made before DOL provides written notification of failure to file Form 5500
 - IRS late-filer penalty letters do not disqualify a plan from participating in the DFVCP



Addressing Plan Issues

- Voluntary Fiduciary Correction Program
 - Eligibility: Neither the plan nor the applicant is “under investigation” and the application has no evidence of potential criminal violations
 - Only for issues listed in the program (e.g., late remittance of participants’ contributions, below-market interest rate loans, payment of excessive compensation)
 - Correct the issue(s) and obtain DOL approval



IRS Tips

- “Review your plan annually to make sure it’s operating according to its terms and the law.”
- Have strong internal controls for the plan.
- “Know what your service agreement does and doesn’t cover” (e.g., providing notices to eligible employees).
- “Keep up with the rules.”
- Many IRS (and DOL) agents have told me that “There is no fully-compliant 401(k) plan or 403(b) plan in the U.S.”
 - Use their correction programs!



ERISA Litigation: Most Common Topics Covered by Recent Cases

- Most common case involves plaintiffs asserting that defendants (plan sponsor, plan committee(s), individual fiduciaries):
 - Failed to monitor the recordkeeper's fees;
 - Failed to monitor the investment options' fees;
 - Failed to monitor the investment options' performance.
- Plaintiffs seek court order requiring defendants to:
 - Restore financial losses to the plan;
 - Conduct RFP for recordkeeping services;
 - Attend periodic fiduciary training, or refrain from ever serving as ERISA fiduciary again 😊
- Trend:
 - Courts ruling that there is no legal obligation to use the lowest-cost recordkeeper or lowest-cost investment options.
 - Courts ruling that plaintiffs' "Monday morning quarterbacking" does not support claim that defendants are liable for one or more investments' substandard performance.
- Courts and DOL continue to focus on process by which fiduciaries arrived at their decisions.



ERISA Litigation: Other Topics Covered by Recent Cases

- Workplace retaliation
- Beneficiary designation
- Plan's definition of "Compensation" (e.g., bonuses)
- Cybersecurity
- Summary Plan Descriptions
- Fiduciaries' potential liability for predecessors' imprudent conduct
- Late remittances of employees' contributions
- Stealing plan assets
- Homicide (yes, really!)



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Ed Frado is an employee benefits attorney who has specialized exclusively in this field for over two decades. Prior to founding his law practice, Ed's employers included the Denver accounting firm of Anton Collins Mitchell LLP (now BDO USA, LLP), as well as Towers Perrin (now Willis Towers Watson) and Arthur Andersen.

Ed applies his enthusiasm and affable nature when advising clients on a wide array of employee benefits issues. This includes performing compliance reviews for plans of various size and complexity, preparing filings under the Internal Revenue Service's and Department of Labor's correction programs, drafting plan documents, amendments, summary plan descriptions and other participant disclosures, and analyzing retirement plans involved in merger/acquisition transactions. Ed represents clients that are undergoing Internal Revenue Service and/or Department of Labor retirement plan examinations, and he negotiates with those agencies on various plan matters outside the examination arena as well. He has extensive experience with Form 5500 preparation for retirement and welfare benefit plans, including advising employers about the Form 5500 filing requirements for welfare benefit plans. In addition, Ed serves clients by providing timely updates with respect to the frequent changes in employee benefits laws, regulations and other guidance.

Ed earned a B.A., *cum laude*, in Legal Studies from the University of Massachusetts at Amherst and a Juris Doctor, *cum laude*, from Suffolk University Law School in Boston, Massachusetts. Ed is licensed to practice law in Colorado. He enjoys speaking at conferences and training events, including annual events sponsored by the Colorado Society of Certified Public Accountants, and various events for the American Payroll Association, COSHRM, and other professional groups.

