

# EMPLOYEE BENEFIT PROGRAMS — WHY SHOULD YOU BE CONCERNED?

Mary Andersen and Len Marinaccio

Pick up any business related periodical and you invariably see articles, such as the following, on ERISA compliance, increased fiduciary penalties, or increased benefits litigation.

- DOL sues trustees for improper loans

*MARY ANDERSEN, CEBS, has over 25 years of successful benefits consulting and administration experience which spans both corporate and consulting, having worked at small and large corporations directly and in a consulting capacity with many Fortune 500 organizations. Ms. Andersen is a frequent speaker on compliance related issues, was an instructor for the CEBS program and the College of Insurance in New York and served on the Board of the ASPA Benefits Council of the Delaware Valley.*

*LEN MARINACCIO formed Strategic Interventions to serve his clients using a consulting approach that recognizes that an understanding of their business, culture, and strategic focus is an absolute precedent to creating value and delivering quality. A broad-based HR consultant and business manager, with over 25 years of experience he is uniquely qualified in the field of human capital management consulting, including alignment of resources with business goals, rewards and recognition, mergers and acquisitions, and compensation.*

- DOL sues for failing to forward contributions to plan
- DOL and IRS announce joint project for failing to file Form 5500 Returns
- PWBA had a record year for FY 2002 Plan Recoveries
- Participants sue employers for plan benefits

Governance of regulated employee benefit plans is as serious an issue as the corporate governance issues raised in the recent headlines. Like corporate governance the following questions are invariably asked: Where was the Board of Directors? How could this have happened? Didn't the management team really understand what they were doing? If they didn't know, how are we supposed to know? Where was Human Resources?

As you read the headlines you might be saying, "I'm glad that wasn't me, my company or my plan." What if it was or will be in the future? Today's participants are better informed than ever before and not hesitant to ask questions,

demand answers or litigate. At the same time as litigation involving qualified plans is becoming more frequent, we have noted an increase in litigation for nonqualified plans. If you are faced with questions from participants regarding how or why certain actions were taken, will you have the answers? Are you prepared to defend your actions with respect to the plan? Even if you have been responsible for governance and compliance for a while unless this is your only responsibility, there is a good chance that despite your best efforts, something slipped by. If these are new responsibilities, you are just finding out the answers. Dealing with plan problems, whether real or perceived, can be expensive from both a financial and reputational perspective. The financial aspect can be substantial in terms of hard dollars as well as redeployment of scarce resources to address the situation. In addition, lost value and productivity resulting from erosion of participant confidence can be equally and ultimately more expensive. What can plan sponsors do to help alleviate their concerns?

An approach taken by many plan sponsors is to conduct a plan governance either in conjunction with or followed by a compliance and operational review. Plan sponsors either perform the review using internal staff; hire a compliance review expert or some combination. Once you decide to perform the review –how do you get started?

### **OVERSIGHT AND MONITORING - THE GOVERNANCE ACTIVITIES**

Who are the plan's fiduciaries? ERISA provides that a person is a fiduciary to the extent he exercises any discretionary control respecting the management of such a plan or exercises an authority or control respecting management or dispositions of its assets or he has any discretionary responsibility in the administration of such a plan. Furthermore, fiduciary status is defined not only by reference to particular titles, but also by the authority that a person has or exercises over an employee benefit plan. During this phase of the review, you should obtain answers to the following questions:

- Who is responsible for your benefit plans?
- What are the various committees responsible for oversight?
- How often do the committees meet? Where are the minutes?
- Who makes decisions, decides claims disputes, interprets the plan, and selects investment options?
- Are there investment policies for any of the plans?
- Are there any administrative policies and procedures that while not part of the plan

document are critical in the administration of the plan?

Perhaps you have more fiduciaries than you thought. Make sure you know who does what with respect to your plans. Make sure you have a record of the various committees involved in operating the plans. Often there is an administrative committee and an investment committee. Sometimes the committees delegate some of their responsibilities. You might even have an appeals committee that handles claims disputes whether it is for retirement benefit calculations or coverage issues. Carefully read the applicable sections of the plan document and identify the activities that are specified. You shall also verify that you have processes in place to fulfill the requirements. Locate the appointment and acceptance documents for the committee members. While you are at it, look for resignations as well.

### **PLAN DOCUMENTS**

Plan documents are the foundation for governance and compliance. The first step in any plan governance effort should be to gather plan documentation. Sounds simple, almost too easy, but, if you have had turnover, or experienced mergers, acquisitions or spin offs, it's not as easy as you may think. Inventory your plan documents. Make sure you have a plan document for each of your plans. Next, identify the plan's service providers and make sure you have copies of all the service contracts. While you are at it, locate the summary plan descriptions, Forms 5500, PBGC forms, summary annual reports as well as the determination letters in the case of qualified plans. Obtain copies of recent employee communications regarding changes to the plans, if any. If you have

collective bargaining agreements, you may want to maintain a copy of the benefit related provisions with your plan document files. If you are new to your position and are still not sure where to start and there is no designated person for benefits or there has been a vacancy, consider contacting in-house counsel or the treasury/finance department. If that fails, call your vendors and see if they can point you in the right direction. It might make sense to hire a specialist to help you establish your foundation for compliance and plan governance.

### **Operational/compliance documentation**

Identify other documentation that is critical to your plans. For example:

#### **401 (k) Plans**

- adp/acp test results
- 415 test results
- coverage test results
- communication material sent to participants
- administrative forms
- administrative manuals - you may have a manual provided by your recordkeeper that details procedures for interacting with the recordkeeper. However, these manuals may not reflect the actual administrative processes that take place at your company
- separate administrative procedures that may have been created, e.g., QDROs, hardship withdrawal, loans if not part of an administration manual
- routine annual communication material sent to participants.

**Defined Benefit Plans**

- data – is your data complete
- calculation routines
- retirement applications and related forms e.g., spousal consents
- terminated vested letters
- coverage testing
- claims appeal process
- administrative manuals and forms

**Health and Welfare Programs**

- notices of pre-existing condition exclusions provided to participants, if applicable
- letters of creditable coverage
- evidence that certificates of creditable coverage are issued
- notices of special enrollment rights to participants, if applicable
- COBRA notices
- HIPAA privacy notices
- administrative manuals and forms

You now may find yourself with a conference room full of material or an office full of boxes overflowing with paper. What are the next steps in your governance efforts?

**ASSESSMENT**

During this step you will inventory existing files or establish files where none exist. Needless to say, you are faced with a lot of material to review. At this point you should consider dedicating someone from your organization to devote the next few weeks to reviewing all the material. Dedicating someone

internally may not be a viable option to many employers who have a skeletal staff. If you haven't done so already, you should seriously consider hiring a specialist to assist you. The specialist will provide an independent look and an extra pair of experienced hands to help you.

As noted above you may find yourself with boxes full of material or piles of paper. Where to begin? Begin with some basic blocking and tackling.

Establish file drawers or files for each plan that you maintain. At a minimum, each plan's file should contain

- Plan document
- Trust Agreement
- Summary plan description
- Committee meeting minutes (often maintained in three ring binders)
- Determination letter for qualified plans
- Summary Annual Report
- Form 5500 (for at least the last 6 years) and backup
- PBGC filings
- Vendor contracts
- Nondiscrimination test results where applicable
- Administrative manuals and forms

**REVIEW**

During this step you will actually read the material you have put into files. If you didn't hire a specialist for the inventory phase, you should consider it now. What exactly are you reviewing for? The items listed below are not all inclusive but should get you started.

**Current**

- The plan documents should be up to date with the latest regulations e.g., EGTRRA either, by amendment, restatement or committee action
- Up to date determination letters should exist for qualified plans; if not available the most recent as well as a copy of the latest determination letter application
- Do you have the latest government filings? (e.g., Forms 5500, PBGC)
- Are vendor contracts current? Do they reflect any additional work that may be required as a result of plan changes? Do you understand the cost of the services provided? Is it reasonable when compared with other providers offering similar services?

**Consistency**

- The plan document and the summary plan description should agree with each other and should be consistent with information communicated to participants
- The Form 5500 and summary annual report should agree with each other (generally not a problem if Form 5500 software is used)

**Completeness**

- Do you have all pertinent plan documentation?
- Upon IRS audit, could you produce back up documentation e.g., for the Form 5500, PBGC forms, adp/acp test results?

- Does the Form 5500 for the 401(k) plan indicate that the plan is a 404(c) plan? If yes, can you demonstrate that all the requirements of 404(c) are met?
- Does the Form 5500 indicate that the plan is part of a master trust? If yes, is there a master trust filing?
- Are committee meeting minutes complete and accurate?
- Can you demonstrate that the investment committee periodically reviews investment performance?

#### **Clarity**

- As you review the material, are the roles and responsibilities of the key players in the plan operation/governance process clearly delineated?
- Are plan provisions clearly supported by administrative processes and documentation?

Chances are that you will discover that there are gaps in your plan files. As you identify what is missing, you should think carefully about assigning overall responsibility to someone for building and maintaining the foundations of your employee benefit programs. Their job description should be specific as to what their responsibilities are and any compensation increases should be dependant upon successful performance of the aforesaid duties.

You will be saying now that offering employee benefit programs is more than just having all the documents in order, and you are correct! After this process, you should have the foundation of your benefit programs, but how

do you know if the plans are really working the way they should? How can you verify that the operating systems are working and working efficiently? How can you verify that the vendors are fulfilling the requirements of the contracts you just read? Do you believe that you will successfully withstand IRS or DOL scrutiny? Are you confident that if one of your employees calls the media or the DOL with a complaint that you can successfully demonstrate that your actions are prudent? An operational review should raise your confidence level with respect to the plan administration process by either affirming that your governance process operates as established or identifying those areas that need attention which will provide you with the opportunity to realign your governance process.

#### **THE OPERATIONAL REVIEW**

The operational review builds on the information gathered in the assessment phase. During the operational review you will

- Identify the key players in the administration of the plans
- Interview the key players with respect to their roles
- Sample plan transactions where appropriate

#### **Identifying the key players**

Some of the key players are obvious but as you gathered the plan documentation, you may have been surprised by how many people were involved in the benefit plan process. Keep in mind each plan will have some different key players. The following is a representative list, however, each organization will be different.

#### Defined Benefit Plans:

- Actuary
- Payroll
- HRIS
- Human resources
- Trustee
- Administrative vendor - if outsourced
- Finance/Treasury

#### Legal Defined Contribution Plans:

- Payroll
- HRIS
- Human Resources
- Recordkeeper
- Trustee
- Finance/Treasury

#### Legal Health Plans:

- Human Resources
- Payroll
- HRIS
- COBRA vendor
- HIPAA compliance officer
- Medical Claims vendor
- LTD provider
- Finance/Treasury
- Legal

#### **Interviewing the key players**

The purpose of the interviews is threefold:

1. to verify that the plan operates in accordance with its terms;
2. to verify that each player in the operational process is aware of his/her responsibility;
3. understands the plan; and

4. to identify potential areas needing improvement.

In the assessment phase, you identified the committee members. You should interview committee members and gain an understanding of their role in the plan governance process. Does it agree with the responsibilities outlined in the plan? Are there periodic committee meeting minutes that document the meetings? For 401 (k) plans, is there a process in place to select, monitor and change investment options?

Your interview questions should include general questions as well as specific detailed questions. You should begin the interview process by asking some general questions including:

- what is your role with respect to the plan?
- who else do you interact with in performing your responsibilities?
- how do you find out about updates to the plans or new regulations?

Depending on the interviewee, your questions will become more focused. Interview questions should be developed for critical areas of the plan:

- Eligibility — who determines eligibility? How? How are newly eligibles notified?
- Hardship Withdrawals — who approves hardship withdrawals? How?
- Distributions/withdrawals — who calculates benefit payments? Withdrawal amounts? How? What are the data sources?

- Government filings — who completes the Form 5500? What are the data sources? Where is the backup maintained?

- Loans — describe the loan process? How are available amounts determined?

- Nondiscrimination — what tests are performed? who performs them? How? Who verifies the results? What are the data sources? Where are test results maintained?

- Minimum Distributions — who notifies participants? Who calculates? What are the data sources?

- What is the process for selecting and monitoring investments? How is the process documented?

- HIPAA — who provides appropriate notices? Who is the privacy officer? What are the privacy procedures? Who provides HIPAA training?

- COBRA — who provides COBRA notices? Who does the billing?

- Leave of Absence/Military Service — what is the impact on benefits?

- Call centers — how do you know that the information provided by the call center is complete and accurate?

These questions are representative of the types of questions you should be asking during the operational phase of your maintenance program. Interview questionnaires are generally very detailed and can be quite lengthy.

#### **Sample plan transactions**

As part of your operational assessment, you should sample repre-

sentative participant files to verify that what you learned in the interview process actually happens. Pick a particular period for review — perhaps the most recent plan year. For example, identify new hires for the period in review and sample a percentage of them to determine if they actually were notified of plan eligibility and received appropriate information. Likewise, select a few terminated participants and determine if vesting was calculated correctly, rollover notices provided, Cobra notices provided etc. You should also sample minimum distributions, hardship withdrawals, loans, QDROs, contributions, etc.

#### **CONCLUSION**

While the first time you undertake the review may seem onerous, it will be well worth it from a fiduciary perspective. The review will provide you with evidence that you are operating your plan in accordance with its terms, demonstrating to the IRS, DOL or the courts that you take your role as plans sponsor and fiduciary seriously. The review will also help you document your compliance road map that will enable you to quickly make changes to all impacted areas as the regulations change. Depending on the results of the review, you might consider developing a review cycle by conducting a more limited review next year followed by a more complete review the following year.

Your employee benefit plans represent an expensive investment in your employees. Remember the old saying “An ounce of prevention is worth a pound of cure.” A review such as the one described is a way for you to protect your investment and can become “your

ounce of prevention.” In addition, such a review will help your HR staff focus on core businesses knowing that the compliance aspect of the employee benefit plans is under control. The review will also minimize the drain on the

bottom line by catching errors and fixing them before they become a major and expensive undertaking. The review will ultimately mitigate litigation and, lastly, because you will be able to demonstrate that you have a process and answer

questions regarding the process with certainty, you will reassure your participants that you fully understand your role and know what you are doing.

