# Top 15 Audit & Compliance Concerns of Employee Benefit Plans

David Marom, President – Marom Consulting, LLC David@MaromConsulting.com
Kelly Watson, Partner - Watson Coon Ryan, LLC kwatson@wcrcpa.com

Never has there been a greater challenge for business owners then there is now. In order to come out of this period as strong as possible, it is especially important that all employers take care of their employees to the greatest extent possible. However, business realities demand that costs and liabilities be controlled or limited to the extent possible. Although we have numerous solutions to lower costs, below we briefly outline the most common strategies to manage compliance concerns as they relate to different types of employee benefit plans.

## Retirement Plans

Retirement plans contain a myriad of compliance requirements, and while they can be extremely beneficial for the participants, they can also open up the company to unanticipated liability if they are not well run. While large plans require annual audits that help to identify and mitigate compliance issues as they're detected, small plans are often left to navigate the arena on their own. Below are some of the most common areas of non-compliance/operational inefficiencies identified during audits:

1. Eligibility – Each Plan is able to establish the guidelines for eligibility based on their own specific needs. While there are IRS limitations on what these may be, there is plenty of gray area to allow for mistakes/misunderstandings.

   Eligibility that is too broad (i.e. eligible on day of hire) can create unintended consequences. As previously discussed, large retirement plans are subject to audit. The threshold for large vs. small is based on the number of eligible participants on the first day of the Plan year. As such, allowing for a broad definition may cause a Plan to require an audit unnecessarily as well as create additional recordkeeping burdens. We recommend consulting with a Plan advisor or attorney to ensure that the parameters of eligibility will meet the Company's needs without causing unnecessary administrative burdens.

   In addition to properly designing eligibility, the Plan must be monitored to ensure that all eligible participants are informed of their eligibility to participate. A best practice we recommend is to ensure the Company maintains evidence in writing that all participants were informed of their eligibility and, ideally, document in writing if they choose to decline. This can serve as evidence of the responsibility being met if it were to ever be challenged in court.

2. Definition of Pay – The definition of pay can be complex as many of the stated definitions are written in sufficient legalese that their intended meaning is not readily apparent. Plans get to determine what types of compensation they want to allow deferrals to be taken on. Common options include gross wages, taxable wages, or wages with carved out exclusions (i.e. bonuses, severance, etc.). Errors are most common when a Company switches payroll providers and fails to appropriately code wages as eligible or ineligible for deferral. Errors may also arise when manual paychecks are created and not thoroughly reviewed to ensure applicable retirement deferrals are included. Utilizing the incorrect definition of pay can create substantial liability for the Company in the case of a lawsuit, and as such we recommend consulting with a retirement plan professional if you are unsure if you are using the correct wage base.

3. Funding Timing – Funding timing is one of the more subjective areas of retirement plan compliance. The general rule is that any money withheld from participants should be remitted to the plan as soon as administratively possible. Plans with fewer than 100 participants were given a safe-harbor rule that allows them to remit within 7 days and consider themselves in compliance. However, for large plans, despite numerous attempts to get a strict answer on how many days that would translate to, no firm guidance exists. Plans in excess of 100 participants must establish their own schedule for remittance. Under audit, typical remittances will be looked at to determine, on average, how long it is taking to remit money to the plan. This is then generally viewed as the cutoff for delinquent remittances.

   For example, if a Plan typically remits in 3 days, but their payroll administrator goes on vacation and the deferral for that period takes 7 days, that remittance would be considered delinquent. Due to the subjectivity in this rule, the interpretation can vary depending on the specific individual making the determination. In some instances, a strict interpretation may say that if a remittance was made in one day on one occasion, that is how quickly all remittances should then be made. In terms of best practices, we recommend establishing a policy in writing on how quickly this remittance will be made on an on-going basis. Plans should also be made to ensure remittances are made on this schedule even when the person in charge of this remittance is unavailable.

4. 5500 Filing – The 5500 is the tax return for a retirement plan, and as such has a large degree of complexity in reporting. While often a retirement plan specialist or CPA will prepare the 5500, the Plan Administrator is required to sign and accept responsibility for the information it reports. As such, we recommend the administrator review the form in its entirety and ask questions to understand any information they aren't able to understand or reconcile to underlying data. Additionally, a number of compliance questions including fidelity bonds, delinquent contributions, etc. should be reviewed to ensure they are accurately responded to.

These are just a few of the multitude of compliance areas that are involved in running a retirement plan. While the requirements can be complex and cumbersome, a wealth of consulting and advisor relationships exist to help companies navigate their way through the set up and operations of a Plan. These relationships should be well vetted to ensure the experts hired are current and competent and will help correctly navigate the compliance course for the Plan.

# Healthcare Plans

The compliance burden of retirement plans is substantial; however an established industry of specialists exists to help employers. Ironically, these plans often cost an employer approximately 3.5% of payroll while healthcare

plans can easily cost over 15% of payroll. The system of ensuring compliance of healthcare plans (and ensuring cost control) can be shoddy. Below are some examples of often overlooked and problematic issues of healthcare plans (e.g. medical, prescription, dental, vision). This is not a comprehensive list but does identify areas most often overlooked.

5. Eligibility - Every employer is bound by the terms of the insurance policy contract and The ACA (healthcare reform). Carriers (including stop-loss carriers) care a great deal about this and in making sure employers follow the terms of the contract. Mistakes can not be simply written off as administrative errors. Imagine this scenario: An employer wants to allow the brother of the owner to enroll in the plan even though he is not on payroll and does not legitimately work for the company. The brother has a $750,000 claim (not unheard of) and because of the magnitude, the carrier audits the employer's records to be sure the member was legitimate. After discovering that the member should never have been covered, the claims are declined, and everyone ends up in court!
6. Discrimination Testing – Most employers offer the same plan to all employees on an equal basis. However, some employers get creative (or purposely try to favor certain employees). Because of this, there are required non-discrimination tests for healthcare plans. One of many tests is the IRC § 105(h) Welfare Benefit Plan Nondiscrimination Test. Under the ACA, Section 1557 rules must be followed.
7. Wrap Plan Doc and SPD – Carriers usually produce the SBC (Summary of Benefits of Coverage), but it is still required that the employer create a Wrap Plan Document and SPD (Summary Plan Description). These documents aggregate most of the benefit plans and provide key ERISA and contractual information to participants.
8. 5500 Filing- Carriers will produce Schedule A information that employers then need to use to complete the IRS/DOL 5500 forms. Violations for late or non-submission can be significant (e.g. up to $2,259/day), while the cost to have a professional firm complete these forms correctly can be minor. Many benefit advisory firms will cover the cost of such service.
9. Miscellaneous (COBRA, IBNR, ACA Fees, Disclosures & Notices, and Privacy Laws) – Here are a few items to watch out for:
    - Federal COBRA laws apply to employers with at least 20 employees. However most US States have "mini-COBRA" laws that apply to smaller employers.
    - Incurred But Not Reported (IBNR) claim reserves are a requirement for self-funded plans. Lag reports need to be evaluated in order to allocate the proper funding amount.
    - Under The ACA, any size company must pay PCORI fees for HRA plans or any self-funded medical plans.
    - For employers with over 50 employees, The ACA requires 1095 coverage notices, SBC distribution, Medicare Part D Prescription Notices, etc.
    - We often see employers get relaxed about privacy and PHI (Protected Health Information), HIPAA, and other related employee privacy concerns. This is especially true when transferring private data across email. Simple encryption software can secure email. Not taking these simple safeguards exposes employers to unnecessary liability.

# Income Protection (Life & Disability) Plans

Though a smaller part of any benefits budget, these plans carry their own unique administrative and compliance obligations.

10. Discrimination Testing-Though eligibility rules are more flexible by using a class structure, employers still need to adhere to uniform eligibility rules, and annual testing should be completed.

11. Imputed Income- Many employers have forgotten, or were never informed, that any employer paid life insurance benefit above $50,000 needs to report the value of premium above this amount as imputed income to the employee. We often design plans to eliminate this requirement.
12. Participation requirements-Supplemental life insurance plans will almost always have minimum participation requirements (minimum count and percentage to total). Contracts can be canceled/non-renewed when participation drops below the required minimum.
13. Employer vs Employee funded (& contract violation)- A confusing aspect for many employers comes into play when the decision is made about LTD (Long Term Disability) payments. If the employer pays the whole premium, the benefit is taxable to the employee. If the employee pays the premium, then the benefit is tax free (effectively increasing the benefit amount by over 30%). Premium amounts are often very small, and some contracts allow the employer to "gross up" employee pay so there is no additional cost to employees for this arrangement. Another alternative is a core/buy-up arrangement, similar to life insurance.

# Flex Plans

For tax-advantaged plans, an employee's take home pay can be significantly increased by funding benefits on a pre-tax basis. There are however, two key factors that employers need to watch to keep this benefit sustainable.

14. Discrimination Testing- Similar to testing of other benefit plans, an FSA and Dependent Care Account need to be tested to determine if higher paid employees are benefiting at too great an extent versus lower paid employees. Many vendors or advisors will do this free for clients, but clients need to know to ask. For smaller employers, the Dependent Care Account often fails this test and higher paid employees are not able to fully contribute as they would like.
15. Plan Documents- Many payroll companies aggressively pursue their clients to sell them plan document services for IRS code section 125 plans. Although necessary, employers often have such documents tucked away in a filing cabinet that they have forgotten about. If not, there are often solutions less expensive that certain payroll companies' fees.

Employers should check that all 15 items listed here have been addressed by their benefit providers, internal staff, or trusted advisors. Noncompliance penalties can be substantial, and most are easily avoidable.