

# Mitigating Employee Benefit Plan Risk: What Executives Need to Know

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Regulatory agencies impose many provisions on employee benefit plans, and organizations failing to comply can be subject to significant civil penalties and costly litigation. To improve their compliance and mitigate the financial and reputation risk associated with benefit plan governance, executives first need to understand who in their organizations is responsible for the many tasks that benefit-plan compliance requires. Then, by asking themselves tough questions about their plans, executives can identify the improvements needed and take steps toward better compliance.

The alphabet soup of regulatory agencies overseeing employee benefit plans consists of the [Internal Revenue Service](#) (IRS), the [Employee Benefits Security Administration](#) (EBSA) of the Department of Labor (DOL), the [Pension Benefit Guaranty Corp.](#) (PBGC), and, in some cases, the [Securities and Exchange Commission](#) (SEC).



## Two Types of Risk

Organizations that offer employee benefit plans face related financial and reputation risk.

### **1. Financial Risk**

The DOL can reject deficient filings and assess penalties of up to \$1,100 per day without limit on plan administrators who don't file Form 5500 – the Annual Return/Report of Employee Benefit Plan – or file incomplete forms. The IRS can impose additional penalties. If a plan is involved in prohibited transactions (such as late remittances of employee deferral contributions, payment of improper expenses out of plan assets, or incomplete fee-disclosure notices), there are correction costs and possible excise taxes to be paid. Fraud perpetrated in the plan can also result in plan losses.

### **2. Reputation Risk**

Because Forms 5500 and their accompanying audited financial statements are publicly available on the [DOL's EFAST2 electronic filing website](#), filings can provide plan participants with ammunition for litigation against benefit plan sponsors and trustees, resulting in adverse publicity as well as costly judgments.

Executives need to be aware of these risks and take appropriate steps to reduce the chances that errors and fraud can affect their benefit plans and organizations.

## Four DOL Enforcement Programs

Through EBSA, the DOL has developed the following programs to enforce benefit plan rules and regulations:

### **1. Employee Stock Ownership Plan (ESOP) Project**

This initiative is designed to identify and correct violations of the *Employee Retirement Income Security Act* related to the incorrect valuation of employer securities in ESOPs. The ESOP Project addresses other issues as well, including the failure to provide participants with voting rights, the ability to diversify their account balances at certain times, and the right to sell their shares of stock when received.

### **2. Contributory Plans Criminal Project (CPCP)**

The CPCP targets individuals who commit fraud and abuse against participants and beneficiaries of contributory employee benefit plans.

### **3. Employee Contributions Initiative (ECI)**

The ECI project investigates delinquent employee contributions.

### **4. Health Benefits Security Project (HBSP)**

The HBSP combines EBSA's established enforcement initiatives for health plans with the new protections provided by the *Affordable Care Act*.

Collectively, these and other regulatory initiatives mean one thing: executives who lead organizations with employee benefit plans face more and greater risks now than ever before.

## Six Questions Executives Should Ask

Plan sponsors, committee members, and other fiduciaries have a number of major responsibilities, including the following:

- Administration and oversight of the plan's reporting and operations
- Design and documentation of the plan
- Implementation and monitoring of controls
- Monitoring and oversight of third-party providers
- Timely and accurate recordkeeping and record retention

Although many tasks that are part of these responsibilities can be outsourced, the responsibilities cannot. An executive can help mitigate the risks associated with these responsibilities by answering the following questions about his or her organization:

### **1. How effective is our plan committee structure?**

Effective plan governance requires a strong committee structure to monitor all aspects of employee benefit plan administration and compliance. Smaller organizations might get by with a single committee, but larger organizations find it useful to have multiple committees with separate duties. For example, some organizations might have an investment committee to oversee the financial aspect of their plans and a benefits committee to supervise plan design and operations. Other important tasks include maintaining the committee charter

and governance policies, having committee members formally acknowledge their fiduciary responsibilities, and rotating committee members periodically to provide fresh perspectives.

## **2. Who is responsible for compliance?**

It is critical that executives know exactly who in the organization is responsible for major compliance tasks. These tasks include the timely filing of Form 5500, remittance of plan contributions, and delivery of accurate plan data to third-party administrators. In addition, the individuals responsible for these tasks need to update plan documents for legal and operational changes and provide participants with required notices, such as fee disclosures, qualified default investment alternative notices, and safe harbor notices.

## **3. Is our plan audit the best it can be?**

An annual audit helps confirm the financial integrity of the plan and the protection of its assets. An audit also helps plan administrators carry out their legal responsibilities to file complete and accurate annual returns and reports for each year, and it can lead to recommendations for improvements to plan operations. Executives should verify that the auditors they evaluate and select have the technical training and knowledge to perform high-quality audits and that the auditors recognize the importance of audits beyond the fulfillment of governmental regulatory requirements.

## **4. Who is responsible for maintaining plan documentation?**

Accurate documentation is a cornerstone of effective plan governance. Examiners from the DOL and IRS rely on plan documentation to assess compliance. Executives should see that the responsible individuals retain the following:

- Plan documents, adoption agreements, trust agreements, summary plan descriptions, and IRS determination letters
- Communications with the DOL and IRS
- Filings made under the EBSA's Voluntary Fiduciary Correction Program or other similar programs, including any Form 5330 filings
- Investment and administrative policy statements
- Committee meeting minutes
- Annual compliance testing results
- Annual Form 5500 filings with related audit reports where applicable

In addition, organizations should retain general ledger records, trial balances, and trust reporting, both interim and annual; contribution schedules, including dates remitted and deposited and records of proper authorization; copies of wire transfers or other documentation showing dates and amounts of deposits; and copies of all applicable paper documents.

## **5. Are our plan controls firmly established and clearly documented?**

The strength of the internal control environment of the plan operations is another important consideration. Organizations need to develop documented procedures for how plan transactions are authorized. In addition, organizations should obtain and review the Statement on Standards for Attestation Engagements (SSAE) 16 reports from their plan's payroll processor, recordkeeper, trustee, custodian, and any other service provider. The

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<sup>1</sup> See, for example, "Plan Governance Checklist," Crowe Horwath LLP, <http://www.crowehorwath.com/ContentDetails.aspx?id=11318>

<sup>2</sup> Jill Czerwinski, Michele Sullivan, and Linda Tuck Chapman, "The New Imperative in Risk Management: Know Your Third Parties," Crowe Horwath LLP, May 2015, <http://www.crowehorwath.com/ContentDetails.aspx?id=11652>

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"Managing Benefit Plan Risks," a recording of a March 25, 2015, Crowe Horwath LLP webinar presentation by Matthew Bowser, John Czarnecki, Staci Guajardo, and Chris Salvatore, is available at <http://www.crowehorwath.com/ContentDetails.aspx?id=11317>

report documents a description of the service provider's system and related controls, including the applicability of user controls. Support for plan management's monthly or quarterly review of plan records – such as distribution reports, loans, and overall trust reporting – should be retained as well. In addition, organizations should regularly review company census data and verify the accuracy of information they provide to third-party administrators and actuaries.

### **6. Is the right governance structure in place?**

If organizations have the right governance structure and controls in place, compliance is likely to follow, and risks for the plan and its fiduciaries are likely to diminish. The Institute of Internal Auditors (IIA) endorses the [three-lines-of-defense approach to risk management](#). This IIA model can help organizations assess how well they are doing with managing benefit plan risk and help define and assign responsibilities for accountability in different areas of the organization.

## Four Ways to Make an Impact

To reduce the risk exposure of their organizations' benefit plans, executives should consider taking these four actions:

### **1. Define responsibilities.**

See that the employees involved in plan operations or oversight have a clear list of their responsibilities. Discuss these responsibilities with the heads of departments and benefit plan committee chairs. Segregate employees' duties to provide appropriate checks and balances.

### **2. Use checklists.**

So that the relevant bases are covered, employees should use governance and compliance checklists.<sup>1</sup>

### **3. Brainstorm.**

Conduct a brainstorming session with management or the benefit plan committees to identify any overlooked areas at risk for errors or fraud. Document the brainstorming process and take actions to mitigate any newly identified risks.

### **4. Don't forget third parties.**

Set up a schedule to evaluate and benchmark the performance of third-party service providers, such as claims administrators, actuaries, auditors, investment managers, and recordkeepers.<sup>2</sup>

Asking the questions and taking the actions outlined here are likely to boost an executive's ability to effectively carry out the fiduciary responsibilities related to his or her organization's employee benefit plan.