



The 403(b) Blues

For those of us in the industry it is no secret that 403(b) plans face difficulties in maintaining ERISA compliance. This became very apparent to me a few weeks ago when I was the keynote speaker at a conference for non-profit organizations. The questions ranged from, “What if I don’t have a plan document?” to “Am I required to file a Form 5500?” I was overwhelmed by the numerous questions. After most speaking engagements I usually have a handful of plan sponsors who have technical questions but this time the amount of people who wanted to talk to me was astonishing. Plan compliance for non-profits is so egregious that in 2011 the ERISA Advisory Council generated a comprehensive report on the challenges facing the 403(b) market for the Secretary of Labor.

In addition to my speaking engagements, I have done several consulting jobs for some very large 403(b) plans in which many substantial issues have been found. Regardless, if a plan is a 403(b) or 401(k), fiduciaries that do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan’s assets resulting from their actions. During my time as a Senior Investigator, if a fiduciary was found to be in violation, the company will almost always pay the amount owed. Most often a fiduciary only pays when the sponsoring company is insolvent. But, what happens when a 403(b) plan goes bad?

Let’s look at a potential scenario; a 403(b) has a retirement plan committee that consists of the CEO, the CFO, the Director of HR and a board member. The plan is cited during a DOL investigation to have multiple violations and the total monetary value owed to the plan is \$100,000. Who is responsible? If you were a board member (non-committee member) you have a fiduciary responsibility to the non-profit and its financial wellbeing. Is it prudent for the non-profit to pay for the fiduciary breach? Should the Board hold the fiduciaries responsible for their lack of oversight and internal controls? Could the non-profit lose potential donors when they find out \$100,000 of their donations were spent paying for a breach of fiduciary duties.

Let’s take a hardline approach and say as a Board it was decided to hold the fiduciaries personally liable. Let’s assume that this involved litigation and some very hard feelings. Now, because of the action brought by the board, the CEO, the CFO, the Director of HR and the board member resign. Now the non-profit is without leadership and spiraling into the gutter. It has lost a majority of its donor support due to unwanted publicity and the big annual gala and fundraising is now a bust.

As a fiduciary to a 403(b) plan, it is essential you understand your fiduciary responsibilities. Even a few omissions of ERISA can pose potential risks to the overall health of the non-profit. Solid management, internal controls and a plan management program is essential. Furthermore, hiring professionals who are well versed in retirement plan management and ERISA can significantly improve results.