


Employer Compliance Alert

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“Meeting employee needs
is a challenge.
Meeting the government’s
is critical.”

▶ 401(k) COMPLIANCE QUESTIONNAIRE MAY TRAP UNWARY PLAN SPONSORS

As part of a recent IRS compliance initiative, 1,200 sponsors of 401(k) plans will soon be asked to complete a lengthy [Questionnaire](#). This Questionnaire contains 69 questions, many divided into numerous subparts. Employers will have 90 days to respond. According to the IRS, “failure to complete the Questionnaire will result in further enforcement action” – up to and including an audit of the plan. Any employer receiving this Questionnaire should therefore move promptly to gather the voluminous and detailed data needed to respond, much of which may not be readily available.

Before actually responding, however, an employer would be wise to seek legal counsel. Many of the questions on the Questionnaire go beyond the scope of the 401(k) plan. For instance, a respondent is asked to provide the number and type of *nonqualified* plans it sponsors (Question 3b). An employer should ensure that the information it provides in response to this question is consistent with the approach taken by the employer in complying with the requirements of Code Section 409A. It will also want to consider its approach to ERISA’s reporting and disclosure rules (e.g., the number of nonqualified plans referenced in “top-hat plan” registration statements).

Other questions appear designed to trap a respondent into admitting noncompliance with various Tax Code requirements. Such questions relate to an employer’s ineligibility to maintain a SIMPLE 401(k) plan (question 22b), the granting of participant loans in excess of the \$50,000 limit (Question 25f), and using rollovers to start up new businesses (Question 41).

But the largest potential exposure is likely to come simply from discovering that the plan failed to comply with one or more of the rules governing 401(k) plans. This is where legal advice is imperative. Virtually all of these problems can now be corrected under one of the IRS’s voluntary correction programs. Although the IRS has made clear that receiving this Questionnaire will not cause a plan to be “under examination” – such that it would be ineligible to take advantage of these programs – corrective action should still be taken *before* the completed Questionnaire is submitted to the IRS. This will ensure that any audit that might be triggered by the Questionnaire does not undermine the plan’s ability to use these correction programs.

With only 1,200 sponsors slated to receive the Questionnaire – at least in the initial round – the odds of an employer being *required* to complete it are slim. Nonetheless, *all* 401(k) plan sponsors should at least *consider* completing the Questionnaire. Doing so should serve as an excellent way of

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conducting an internal compliance audit that focuses on exactly the issues of greatest concern to the IRS. Any instances of noncompliance that might be discovered as a part of that internal audit could then be voluntarily corrected under one of the IRS correction programs before any IRS audit is initiated.

Spencer Fane's Employee Benefits Group would be pleased to assist employers with this internal audit process. We will review a completed Questionnaire for a low flat fee and then advise a 401(k) plan sponsor of any operational violations for which corrective action should be taken. Just contact any member of our Employee Benefits Group to arrange for such a review.

Kenneth A. Mason, Partner
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