

ERISA ALERT

205 North Tenth Street, Suite 300 · Boise, Idaho 83702
 208.342.5522 · 1.866.ERISALAW
 www.erisalawgroup.com

IRS Launches Nationwide 401(k) Compliance Check

-- Be Prepared Now and Later --

The Internal Revenue Service enforces the federal taxation requirements applicable to Internal Revenue Code Section 401(k) plans.¹ The IRS' keen interest in employers' compliance with the law stems from the staggering and unparalleled tax benefits that 401(k) and other "qualified" retirement plans enjoy. The IRS employs a variety of ever-changing tools to encourage and/or force compliance, and in this vein it just announced a new initiative.

The initiative involves mailing questionnaires to 1,200 randomly selected 401(k) plan sponsors throughout the United States. The questionnaire is extensive (64 pages in length; 69 questions) and seeks detailed, significant, probing, and potentially incriminating information. The questions run the gamut of a plan's operations including (paraphrasing):

A deliberate and timely response to the questionnaire is compelling.

- has there been a theft or fraud of plan assets?
- how many dollars annually are being contributed for the highly compensated employees?
- does the plan have an internal compliance annual checkup (in contrast to a CPA audit)? and
- why does the employer believe participation is low?

Although some questions may be answered correctly by an employer, most are technical requiring expert legal guidance.

Although the IRS states that the questionnaire is not an "examination" (more commonly referred to as an "audit"), the answers to the questions may lead to an examination. The IRS also asserts that an employer's failure to timely respond to the questionnaire will lead to an examination, a process every employer (even the rare employer with a perfect plan) should try to avoid.

Every sponsor of a 401(k) or other ERISA plan must recognize the existence of the IRS and DOL plan correction programs.

¹ The United States Department of Labor has jurisdiction over the non-tax components of ERISA's Section 401(k) requirements.

Compliance Check - Continued

-- What to Do --

Any plan sponsor receiving the compliance questionnaire must carefully and deliberately consider its response. We recommend you immediately contact us to discuss the best approach for you before responding. We strongly recommend we review the completed questionnaire well in advance of the response deadline. The IRS previously has issued similar questionnaires for other IRS matters and has subsequently instituted audits based on the employer's responses. If a question discloses a known or potential plan problem or failure, we recommend we advise you regarding your choice of appropriate corrective action before responding to the IRS. Disregarding or sitting on the questionnaire would be a very bad idea.

-- Self Audit and Correction --

Know This Most of All

Although the IRS may be friendly, they are armed, powerful and have their own agenda. They can significantly hurt the well-intentioned employer. Do not respond to them directly, even if you believe it is innocuous, without counsel.

Whether you receive the questionnaire or not, a plan sponsor should consider conducting a self-audit of its 401(k) plan, or any other retirement plan, to determine its level of compliance. Conducting a self-audit with experienced ERISA counsel will allow you to evaluate your plan's compliance and corrective measures on your own terms (and not on the defensive).

An employer that identifies issues may use the IRS' Employee Plans Compliance Resolution System ("EPCRS") and/or the Department of Labor's remedial programs to address areas of noncompliance. Under EPCRS, an employer corrects plan qualification failures, sometimes through disclosure to the IRS and payment of a fee, and minimizes or eliminates the risk of costly and burdensome sanctions. An employer that catches and corrects mistakes will be treated far more favorably than the employer that is asleep at the wheel. Good intentions mean nothing to the IRS in that circumstance – like a speeding ticket, the law is the law.

For information regarding EPCRS, which every plan sponsor should know about, enclosed are two articles drafted by John Hughes and Jeff Mandell.

The IRS is trying to get smarter in its enforcement efforts. This initiative will be used by it to audit more plans. Although the statistical likelihood of an audit is always low, the stakes are extremely high if you are audited either now or in the future as the net widens.

Below please find information from the IRS. You may access the questionnaire at: http://www.irs.gov/pub/irs-tege/epcu_401k_questionnaire.pdf. For additional information or if you have questions, contact Jeff or John.

An employer that catches and corrects mistakes will be far less vulnerable than the employer that does not.

This bulletin is intended to provide general information only and does not provide legal advice. This bulletin does not discuss potential exceptions to the above rules. The application of ERISA laws can be complex. For information regarding the impact of these developments under your particular facts and circumstances, please call us. This material may also be considered attorney advertising under court rules of certain jurisdictions.

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Employee Plans Compliance Unit (EPCU) - Featured Project - 401(k) Compliance Check Questionnaire Project

Welcome to the 401(k) Compliance Check Questionnaire Project Page! Here you can find everything you need to know about the project and to complete the Questionnaire.

Background

401(k) plans represent the largest retirement plan market segment and have a significant impact on the health of the private retirement system in America. These plans have far surpassed defined benefit pension plans as the preferred retirement vehicle for the majority of employers. Employee Plans Examinations, previously conducted a baseline study of 79 market segments, and the findings indicated that 401(k) plans are by far the most non-compliant plan type in the retirement plan universe. Since these plans make up over 60% of the retirement plan universe, it is important to the future of the private retirement system that these plans maintain the highest level of compliance possible.

The Project Process

A team from all different areas of Employee Plans worked to develop this comprehensive questionnaire. This project will contact a random sample of 1,200 401(k) plan sponsors that filed a Form 5500 for the 2007 plan year. Plan sponsors who receive a letter will complete the Questionnaire by accessing an easy-to-use website. The Questionnaire categories are:

- ✕ Demographics
- ✕ 401(k) plan participation
- ✕ Employer and employee contributions
- ✕ Top heavy and nondiscrimination rules
- ✕ Distributions and plan loans
- ✕ Other plan operations
- ✕ Automatic contribution arrangements
- ✕ Designated Roth features
- ✕ IRS voluntary compliance programs
- ✕ Plan administration

The information gathered from the Questionnaire will ultimately result in a report published by the IRS describing the responses and identifying those areas where additional education, guidance, and outreach is needed; and how we can focus our enforcement efforts to address and/or avoid noncompliance related to these plans.

This contact is a compliance check. A compliance check is not an audit or investigation under section 7605(b) of the Internal Revenue Code or an audit under section 530 of the Revenue Act of 1978, however, failure to complete the Questionnaire will result in further enforcement action. If you have any questions regarding your specific compliance check questionnaire, please contact the Internal Revenue Service promptly at the phone number provided on the letter.

If You Receive a Letter

Follow the [instructions](#) you received in the mail. To begin completing the Questionnaire, click the link and enter the security information that is listed on your instructions.

Complete The Questionnaire

If it is not possible to complete the Questionnaire online, contact the person listed on the cover letter or e-mail the EPCU.

If There Are Any Questions

Please feel free to e-mail us and we will be glad to answer any questions you have about the project. Please include "401(k) Plan Questionnaire" in the Subject line.

Other Resources (Please click "Back" arrow to return to this EPCU page.)

- [View/Print The Guide to Completion of the 401\(k\) Questionnaire](#)
- This is the paper copy of the online 401(k) Compliance Check Questionnaire. This is not the questionnaire; it is intended to assist in completion of the questionnaire. **Do not return this paper copy.** If you are unable to complete the questionnaire online because of a disability, contact the person listed on the letter you received.
- [Glossary](#)
- [FAQs](#)
- [Cover letter](#)
- [Instructions](#)
- [401\(k\) Plans](#)
- [401\(k\) Resource Guide](#)
- [401\(k\) Fix-It Guide](#)
- [Form 2848 and instructions](#)

<http://www.irs.gov/retirement/article/0,,id=223440,00.html>

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Employee Plans Compliance Unit (EPCU) - Featured Project - 401(k) Compliance Check Questionnaire Project - Frequently Asked Questions

What is the 401(k) Compliance Check Questionnaire Project?

The 401(k) Compliance Check Questionnaire Project is a compliance check project being administered by the Employee Plans Compliance Unit (EPCU). This project is designed to be a comprehensive look into 401(k) plans to determine potential compliance issues, gain a better understanding of the reasons for noncompliance and determine any potential plan operational issues. This project will also assist us in developing additional education and outreach materials to improve future compliance and help us determine where best to focus our enforcement efforts.

Why was my plan selected?

The 1,200 plans selected to receive this compliance check were selected at random from 401(k) plans that filed a Form 5500 for the 2007 plan year.

Is this an audit?

This is a compliance check, which is neither an audit nor an investigation under IRC section 7605(b) nor an audit under section 530 of the Revenue Act of 1978. This is not a review of an organization's books and records.

What is a compliance check?

A compliance check is a review by the IRS to determine adherence to certain compliance requirements under the Internal Revenue Code.

Am I required to respond to this compliance check?

Yes, a compliance check is an enforcement action which you must respond to. Failure to respond, or to provide complete information will result in further enforcement actions which may include an examination of your plan.

What if I am unable to respond online?

If you are physically unable to respond online, you should contact the person listed on the letter you received.

What if I can't access the online questionnaire?

If you can not access the questionnaire online, you should contact the person listed on the letter you received.

<http://www.irs.gov/retirement/article/0,,id=223492,00.html>

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