

GETTING IT RIGHT – KNOW YOUR FIDUCIARY RESPONSIBILITIES

A COMPLIANCE ASSISTANCE PROGRAM



EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U.S. DEPARTMENT OF LABOR



Health Benefits Education Campaign

What It Means To Be A Group Health Plan Fiduciary

U.S. Department of Labor
Employee Benefits Security Administration

Fiduciary Education Campaign

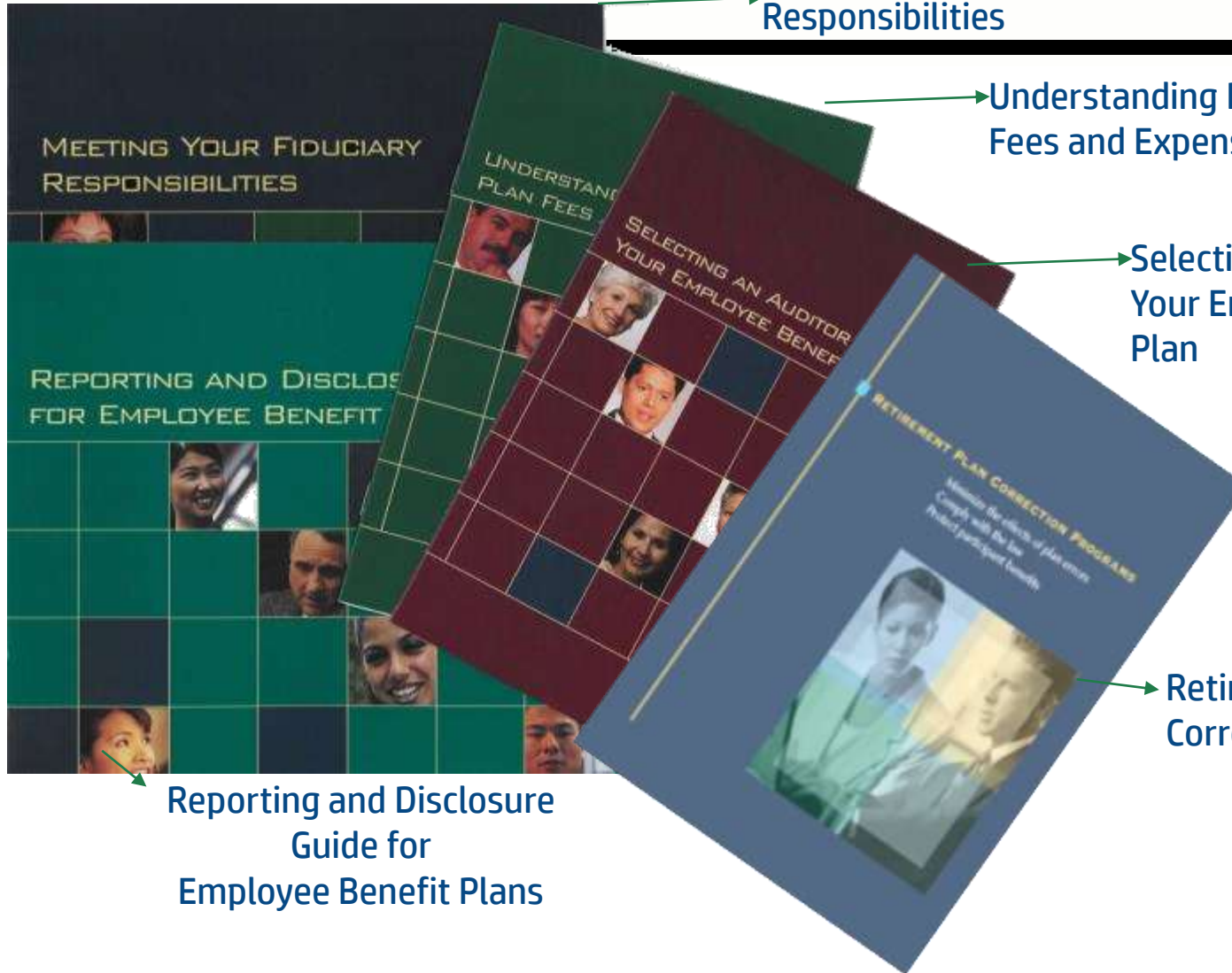
Meeting Your Fiduciary Responsibilities

Understanding Retirement Plan Fees and Expenses

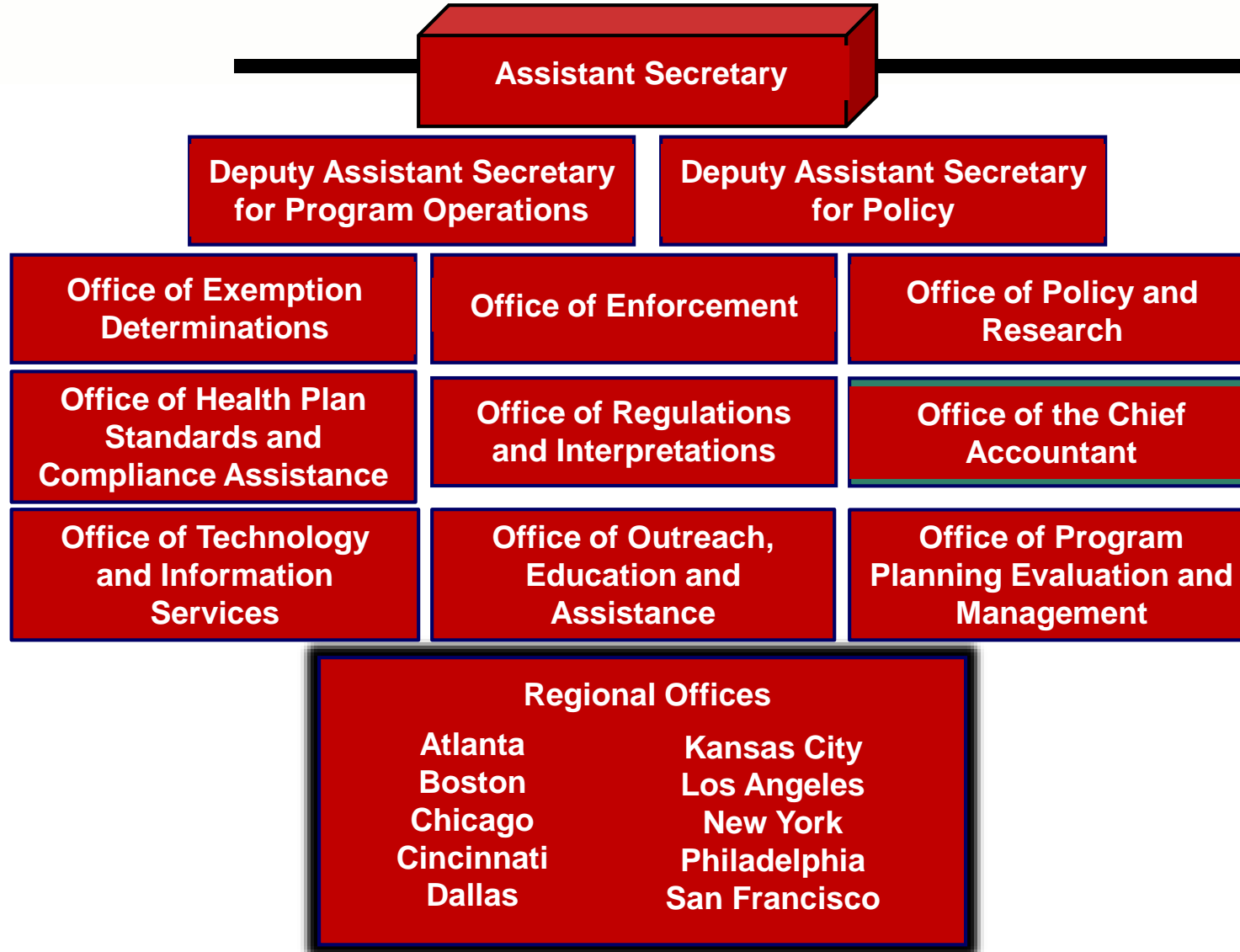
Selecting an Auditor for Your Employee Benefit Plan

Retirement Plan Correction Programs

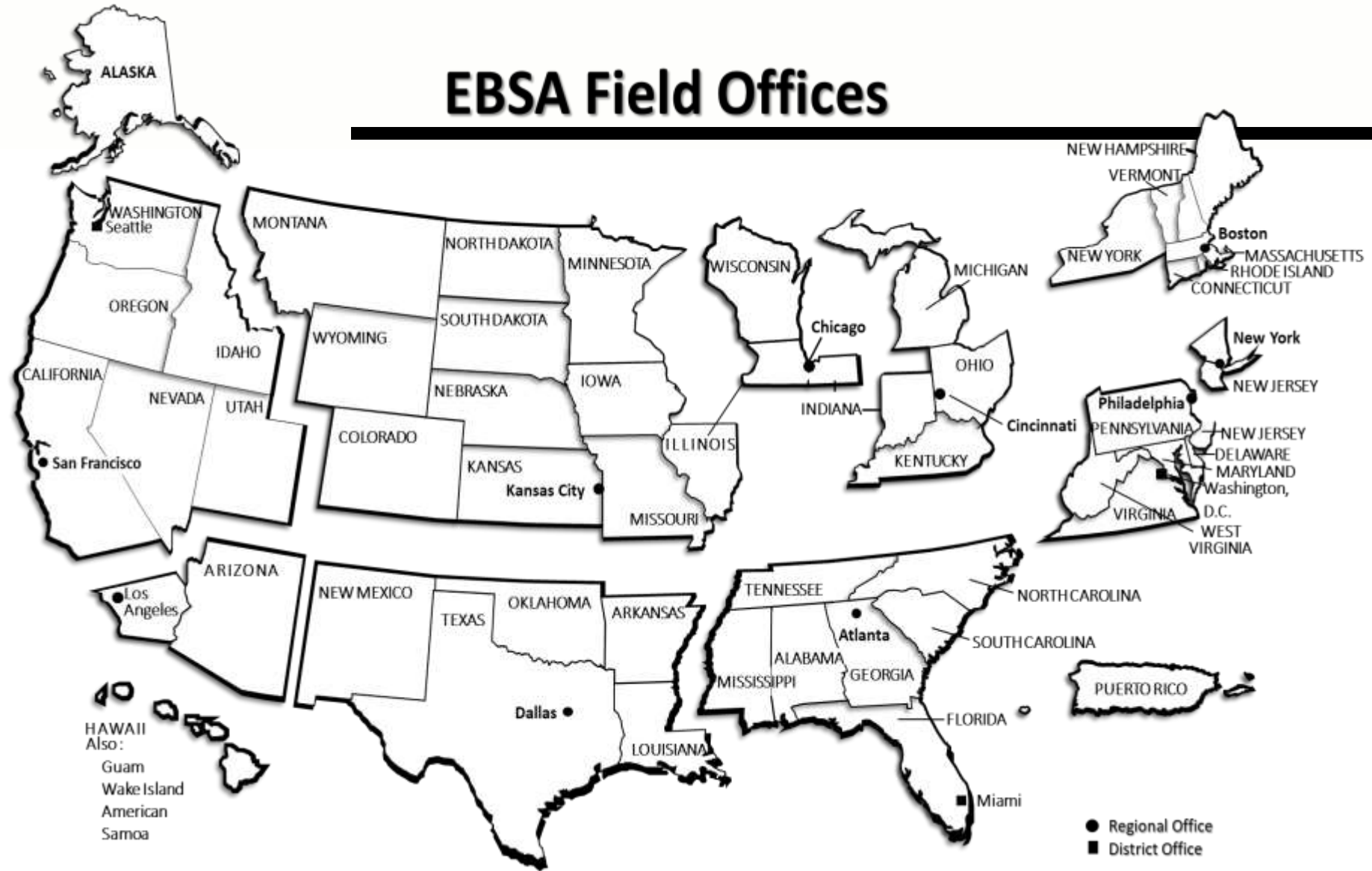
Reporting and Disclosure Guide for Employee Benefit Plans



EBSA Organizational Chart



EBSA Field Offices



ERISA and Internal Revenue Code

ERISA –

reporting, disclosure, fiduciary responsibility, prohibited transactions, benefit claims procedures, etc.

Internal Revenue Code –

tax qualification rules

Elements of a plan

- **ERISA and the Code – plans must be maintained pursuant to written instruments**
 - **describing benefit structure and operation**
- **ERISA also requires that the written instruments provide for one or more “named fiduciaries” – responsible for the operation and administration of the plan**



Tips for Avoiding Common Problems

- ◆ Carefully select and monitor service providers
- ◆ Make required disclosures to participants and beneficiaries
- ◆ Understand your plan and your responsibilities
- ◆ Make timely contributions, and monitor plan assets
- ◆ File reports with the government and keep good records

What is an ERISA fiduciary?

- Any person who exercises discretionary authority or control over plan assets or administration, or gives investment advice for a fee.
- ERISA has a “functional” definition - not dependent on job title or documents.

Fiduciary?

- **Plan administrator**
- **Trustee**
- **Plan sponsor**
- **Investment manager**
- **Plan attorney or accountant**
- **Insurance company**

Consequences of failure to fulfill fiduciary duties

Personal liability to make plan whole -- restore plan losses and give up any gains/profits

DOL may sue and also may assess civil penalties

Fiduciary may be removed and barred from being a fiduciary

Basic fiduciary duties under ERISA

- To act **solely** in the interests of the participants and their beneficiaries
- To be prudent
- To pay only **reasonable and necessary** expenses of the plan
- To follow the terms of the plan
- To hold plan assets in trust or with licensed insurance company

Prudence -- If you need help, get it!

- Fiduciary must act with the care, skill, prudence and diligence that a prudent person acting in a like capacity **and familiar with such matters** would use.

Know who is responsible for plan actions

- Benefit decisions
- Disclosures to participants
- Recordkeeping
- Reporting to government
- Custody of plan assets

“Settlor” (business) vs. fiduciary acts

- Plan sponsor business decisions regarding plan design, plan amendment, plan termination are “settlor” activities– not governed by fiduciary rules.
- Plan assets may **NOT** be used to pay for sponsor activities.
- However, implementation of these settlor decisions usually includes fiduciary acts.

Co-fiduciary liability

- A fiduciary will be liable for another fiduciary's violation if the fiduciary –
 - Participates in or acts to conceal a violation
 - Permits another fiduciary to commit a violation
 - Has knowledge of another fiduciary's violation and fails to take reasonable steps to remedy

Fiduciary Tip

Carefully select and monitor service providers for the plan

Tips for selecting service providers

- ✓ Get information from more than one provider.
- ✓ Compare based on same information -- services offered, experience, costs, etc.
- ✓ Low bidder not always best, both cost and quality are important.
- ✓ Make sure any required licenses are up to date (insurers, brokers, TPAs, etc.).
- ✓ Read, understand and keep copy of all contracts.

Tips continued . . .

- ✓ Obtain commitment from provider for regular updates on services.
- ✓ Document process followed in selecting service providers.
- ✓ When renewing, repeat the selection process/confirm that facts on which initial selection was made have not changed.
- ✓ Confirm that any provider handling plan funds is bonded.

Monitor plan service providers

Plan fiduciaries must periodically monitor service providers to make sure the services are being delivered as agreed.

Remember - Fiduciary can be held liable if the service provider fails to perform services.

Fiduciary Tip

Understand your plan and
your responsibilities

Follow the terms of the plan

- Check plan documents & SPD before acting
- Do not exercise personal discretion when terms of plan are clear

Fiduciary Tip

Make timely contribu



Contributions - Overview

- **Employer contributions - contribute per plan documents – failure may result in legal action by plan fiduciary**
- **Participant contributions – become “plan assets” when reasonably segregable from employer’s general assets – failure may result in violation of trust requirements and prohibited transactions.**

Participant contributions – *the rule*

Amounts withheld from employees' wages must be transmitted to plan *as soon as they reasonably can be segregated from the company's general assets.*

A small plan (with fewer than 100 participants) will be deemed to be in compliance if participant contributions are received by the plan within 7 business days. (This is an optional safe harbor for small plans.)

- **Participant contributions**

What if you sign a contract with a recordkeeper, and the contract provides that contributions will be accepted only twice a month?



Participant contributions

Delinquent participant contributions can be one of the biggest problems for sponsors of 401(k) plans.

- ✓ **Review your payroll system and work with service providers to ensure that participant contributions are forwarded to the plan on the earliest possible date in compliance with the law.**

Fiduciary Tip

Avoid prohibited transactions



ERISAspeak

A fiduciary of a Plan shall not cause the Plan to engage in a transaction, if he knows or should know that such transaction is either directly or indirectly between the Plan and a party in interest.

Translation

As a fiduciary, you can't cause the Plan to engage in transactions with people or businesses that have a close relationship to you or the Plan.

Parties in Interest

- ◆ Generally, people or entities that are related to a Plan.

Who Are They?

- ◆ **The main categories are:**
 - **Fiduciaries**
 - **Employees of a Plan**
 - **Sponsoring Employer**
 - **Service Providers**

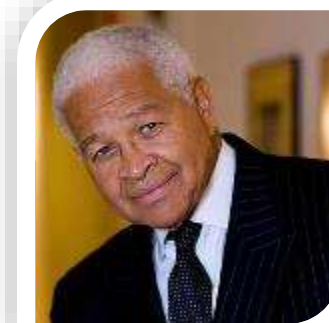


Prohibited Transactions

- ◆ (AKA – **What** not to do with the Plan's money and/or assets and **who** not to do it with)

Prohibited Transactions

◆ **Why?**— to protect Plan participants and their beneficiaries by making sure that their **retirement Plan benefits** are available as promised under their Plan.



Prohibited Transactions

◆ **Remember** – if you're a decision-maker regarding a Plan, you are responsible to the Plan as a **Fiduciary**.



Prohibited Transactions

- ◆ **Under ERISA, a fiduciary may not:**
 - **Cause the Plan to enter into a transaction, if he or she knows or should know that the transaction would be with a party in interest.**
 - **Engage in any kind of fiduciary self-dealing with the plan's assets**

Voluntary Fiduciary Correction Program



**The Department of Labor's
Voluntary Fiduciary Correction
Program (VFCP) administered by
EBSA**

OOPs - Delinquent Participant Contribution Example

- ◆ “I always send the participant contributions to the Plan 15 days from payday.”



Plan Sponsor/Employer

What is the VFCP?

- ◆ Allows “Plan Officials” to correct certain violations before DOL investigates and if done properly, receive a “No-Action” letter from the Department.



VFCP

- **Covers 19 specific transactions and describes acceptable methods on how to correct them.**
- **Eligibility is conditioned upon not being “under investigation” and upon the application not containing any evidence of criminal violations.**
- **Correction must be made prior to submitting an application to the VFCP Coordinator in the EBSA Regional Office.**

Will I need help?

- ◆ **The VFCP is designed to be used by a Plan Official without assistance from an EBSA Regional Office.**



It's Easy to Apply

- Online calculator and display of IRS rates and factors on EBSA website.
- Model Application Form available on EBSA website.
- Includes online compliance assistance tools and reduced documentation requirements.

The screenshot shows the EBSA website interface for the VFCP Calculator - Lost Earnings. The page title is "VFCP Calculator - Lost Earnings" and it includes a navigation menu on the left with categories like "Contact Us", "About EBSA", "FAQs", "Customer Information", "Laws and Regulations", and "Technical Guidance". The main content area features a form with input fields for "Principal", "Less Date", "Recovery Date", and "Final Payment Date", each with a corresponding date picker. Below the form are buttons for "Enter/Calculate", "Reset/Start Over", and "View Instructions". A disclaimer and limitations section is visible at the bottom of the form area.

How Easy?

1. Identify ERISA violations involving the plan and determine if they are covered by the VFCP.
2. Make sure the Plan Official is not under investigation.
3. Follow the VFCP for correcting specific violations (i.e., improper loans, purchases, sales, etc.)
4. Follow the VFCP to calculate and restore amounts due to the plan including any lost earnings or profits.
5. Complete, sign, and date the checklist.
6. File a complete application with your EBSA Regional Office.

What about excise taxes?

◆ **Note:**

- **The VFCP does not get you out of IRS excise tax liability.**
- **In some cases excise taxes may be avoided, if the conditions of a DOL class exemption are met.**

For example –

“I always send the participant contributions to the Plan 15 days from payday.”



Plan Sponsor/Employer

- ◆ **Has there been a violation of ERISA?**
 - ◆ **Yes.**
- ◆ **Is the violation covered under the VFCP?**
 - ◆ **Yes.**

For example *continued*

- Is the plan under investigation?

No.

- Is there evidence of a criminal violation?

No.

- Do you need excise tax relief under the class exemption?

Yes, because this is a use of plan assets to benefit a party in interest which is a violation under the Code.

- Is this a transaction covered in the class exemption?

Yes.

For example *continued*

- ◆ Follow the instructions for correcting the violation.

Late contributions

- pay the plan the greater of:
- lost earnings on the late contributions,
or
- profits from the employers' use of the late contributions

For example *continued*

Documentation

- **contact name**
- **narrative describing the violation(s) and corrective action taken**
- **supporting documents**
- **relevant portions of the Plan**
- **calculation of the lost earnings amount**
- **proof of payment to the Plan**

For example *continued*

Documentation

- penalty of perjury statement
- signed and dated checklist
- copy of accounting records or payroll documents-
 - showing the date and amount of each participant contribution received or withheld

For example *continued*

Documentation

- **statements from a Plan Official**
 - re: earliest date contributions could have reasonably been segregated
 - that there has been no denial of claims for payment or lapse in coverage
 - that any penalties, late fees etc. have been paid by the employer and not from participant contributions

For example *continued*

- Submit all documents to your EBSA Regional Office
- DOL reviews application and if complete, issues a “No-Action” letter.



For example *continued*

- If the violation is a prohibited transaction that is covered under the class exemption the conditions in the class exemption must be met to avoid excise taxes
 - contributions must have been received by the Plan not more than 180 days from when they were received by the employer.
 - applicant may only take advantage of the VFCP and the class exemption within the prior three years
 - written notice of the violation must be provided to interested persons

What is an ERISA group health plan?

- ◆ Employment-based plan that provides coverage for medical care, e.g., hospitalization, sickness, prescription drugs, vision, dental.
- ◆ Plan can provide benefits through insurance or be self-insured (in the self-insured context, benefits are paid from employer's assets or from a separate trust).

Are you a fiduciary?

- Employer
- Insurance Company
- Contract Administrator or “TPA”
- Plan attorney or accountant
- Recordkeeper or utilization reviewer
- Insurance Broker

Fiduciary Tip

Make timely contributions, and
monitor use of plan assets

Contributions

- ◆ **Participant contributions** – become “plan assets” as soon as reasonably segregable from employer’s general assets. **See Safe Harbor Regulation at 29 CFR 2510.3-102.**

As a general matter, these amounts must be sent to insurance company to pay premiums or put in trust promptly, never more than 90 days (unless cafeteria plan.)

- ◆ **Employer contributions** – must contribute or pay premiums per plan documents.

DOL Technical Release 92-01

Provides welfare benefit plans with participant contributions that meet certain criteria with-

- 1. Trust Relief** - Provides non-enforcement policy for the failure to hold participant contributions in trust.
- 2. Reporting Relief** - Provides non-enforcement policy so that such plans can claim Form 5500 filing exemption for “small plans” and simplified filing for “large plans.”

Rules for trust and reporting relief differ slightly depending upon whether a Code 125 arrangement is in place.

Claims procedures for group health plans

DOL Regulation 29 CFR 2560.503-1

- ◆ Timeframes for deciding claims
- ◆ Contents of notices of denial
- ◆ Standards for appeals

Time limits for deciding group health claims

<u>Type of Claim</u>	<u>Initial</u>	<u>Appeal</u>
◆ Urgent care	72 hrs.	72 hrs.
◆ Pre-service	15 days*	30 days
◆ Post-service	30 days*	60 days

◆ * 15-day extension available

◆ Special rules for “concurrent care”



What is COBRA Continuation Coverage?

- ◆ **It is continuation coverage that group health plans are required to offer to qualified beneficiaries (i.e., employees, spouses, dependents) when group health plan coverage would otherwise be lost due to a qualifying event (such as termination or reduction of hours of employment, divorce, death of covered employee, etc.).**

Recordkeepers

- ◆ If you hire a third party to maintain your records – *remember*:
 - Make it clear in your contract which records belong to the plan and when and how records must be maintained and made available.
 - Duty to maintain records **cannot** be avoided by contract, delegation or otherwise – in other words – you are still on the hook.
 - Monitor the work of your recordkeeper.

EBSA contact information

- Contact EBSA electronically at www.askebsa.dol.gov
- EBSA Regional Offices
(866) 444-EBSA (3272)
- Office of Regulations & Interpretations
(202) 693-8500
- Office of Health Plan Standards and Compliance Assistance
(202) 693-8335
- EBSA website: www.dol.gov/agencies/ebsa