

# AVOID A SURPRISE WIPEOUT!

## DON'T LET COSTLY MISTAKES DAMPEN YOUR RETIREMENT PLAN

Companies that sponsor 401(k) plans or other qualified retirement plans must grapple with a complex and ever-changing set of laws and rules to remain compliant. However, even the most diligent plan sponsors will make mistakes. Some of the most common mistakes include the following:

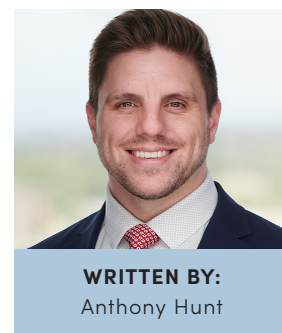
- Failure to provide eligible employees the opportunity to make deferrals or participate.
- Failure to apply the correct definition of “compensation” as defined in the Plan.
- Failure to timely deposit elective contributions to participant accounts.
- Failure to pass annual nondiscrimination tests required by law (e.g., ACP and ADP tests).
- Failure to file Form 5500.

Mistakes like these can jeopardize the Plan’s tax qualification under the Internal Revenue Code (the “Code”), trigger violations under other federal laws such as ERISA, or both. They can also, if left uncorrected, drain employer resources, cause employee relations issues, and invite scrutiny from the Internal Revenue Service (IRS) and the Department of Labor (DOL). So, what should a plan sponsor do when it discovers a mistake? Correct it!

The specific correction required will depend on the type of mistake and the rules it violates. Thankfully, the IRS and the DOL have created programs for plan sponsors to correct, and in some cases *self-correct*, certain plan mistakes.

### **Correction with the IRS**

The IRS established the Employee Plans Compliance Resolution System (EPCRS) to correct mistakes that raise plan qualification issues under the Code. EPCRS contains two correction programs that require IRS supervision and approval, the Voluntary Correction Program (VCP) and the Audit Closing Agreement Program (Audit CAP). These programs are helpful but are expensive and time consuming to utilize. However, EPCRS also allows employers to self-correct certain mistakes. (Note that some mistakes can be corrected only through VCP or Audit CAP and are not eligible for self-correction.) Employers who self-correct under EPCRS do not need to voluntarily disclose the mistake to the IRS or request IRS approval to correct it. This ability to self-correct was recently expanded by Congress through the passage of the SECURE 2.0 Act of 2022 (for more information about SECURE 2.0, please see our article [here](#)). Employers can take advantage of some of SECURE 2.0’s expanded self-correction opportunities now but will need to wait for further IRS guidance to enjoy the full scope of self-correction under a revised EPCRS.



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Employers who complete corrections in compliance with EPCRS will fully resolve the qualification defect under the Code with respect to the corrected mistake.

### **Correction with the DOL**

The DOL offers two correction programs for employers: the Voluntary Fiduciary Correction Program (VFCP) and the Delinquent Filer Voluntary Compliance Program (DFVCP). The VFCP allows employers to voluntarily disclose and correct possible violations of ERISA, including prohibited transactions, improper plan expenses, late deposits of participant contributions, etc. The DFVCP allows employers to voluntarily disclose and correct violations of ERISA's reporting requirements and avoid higher civil penalties by satisfying the program's requirements and paying a reduced penalty.

Although employers can correct mistakes themselves through these programs, doing so is often not recommended. Correcting even straight forward or "simple" mistakes requires attention to detail and a firm understanding of the complex requirements of these programs. If you believe a mistake has been made in connection with your company's retirement plan, please seek assistance from qualified counsel or a trusted retirement plan expert as soon as possible, and when in doubt, correct!

As employers continue to embrace diversity, equity, and inclusion as integral parts of their mission, many have found the benefits of affinity groups or employee resource groups. While these groups can undoubtedly benefit organizations, employers should consider the structure and support of these groups to maximize their potential and avoid potential challenges regarding discrimination and harassment, labor laws, and wage and hour laws.

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*Disclaimer: This summary is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.*