

Why Every Retirement Plan Needs to Conduct a Year-End Amendment Review

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Year-end plan amendment reviews are an important part of satisfying ERISA's fiduciary standards and maintaining tax-qualified status. The fundamental purpose is to determine whether the plan document requires modification to align with administrative practice and the law. Failing to follow the plan document can prove costly. An effective review process can help identify noncompliance (sooner rather than later), including where it is caused by a service provider. The following example illustrates the point.

In 2018, Generosity, Inc., acting as settlor, amends its 401(k) plan document to provide a new type of *match* contribution. The plan terms adopted by Generosity do not require the exercise of discretionary authority to implement the new plan feature.

Veritas, Inc., plan service provider, is contractually obligated to implement the plan in accordance with the plan document. Unfortunately, this did not occur. Instead, Veritas exercised discretionary authority by failing to follow the plan terms with respect to the new *match* feature creating liability in excess of \$1.5 million. Veritas is functioning as an ERISA fiduciary.

During the 2018 year-end amendment review process, Generosity asks the right questions, monitors, and discovers Veritas' failure. Generosity takes steps to correct Veritas' failure. Veritas accepts responsibility.

In the foregoing example, the plan sponsor effectively used the year-end amendment process to monitor the service provider. It is of particular importance where asking the right questions could reveal a service provider has become an ERISA fiduciary, as a result of failing to follow the plan document terms (adopted by the settlor plan sponsor).

Plan sponsors should conduct a year-end plan amendment review with several purposes in mind. The review should yield areas in need of amendment and clarification, due to changes in law or settlor plan design. It should also discover the failure to follow plan terms (or show a documented attempt to discover). The review process is an essential part of satisfying ERISA's fiduciary standards as well as preserving tax-qualified status. Winston & Strawn's [Employee Benefits & Executive Compensation Practice](#) is available to help plan sponsors develop and implement a purposefully-designed year-end amendment review process.

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