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**SERVICING STRATEGIES** Published in PLANADVISER May/June

# Compliance When It's Tough

Advisers should scope out any plan errors to keep their clients on course.

By *Beth Braverman*



Art by [JooHee Yoon](#)

Under normal circumstances, running a retirement plan requires attention to detail to avoid mistakes, but in today's environment the task is even trickier. Consider the [wildly fluctuating investment market](#), companies and staff learning new processes in order to work remotely, the new regulations for loans and distributions.

In addition, plan sponsors' benefits

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clients, working with them to find and correct any issues—and to avoid them in the first place. The Department of Labor (DOL) has said that it would offer some leniency to plan sponsors that, due to COVID-19, fail to follow certain procedural requirements.

But that does not mean a sponsor can sidestep correcting the issues or showing a good faith effort to remain compliant.

“At the end of the day, even now, the DOL and the IRS are still conducting examinations and audits,” says David Kaleda, a principal with Groom Law Group and a columnist for PLANADVISER. “It’s not like the regulators have gone away.”

Even if clients lack the budget or desire for a full-blown self-audit, the adviser can examine the most common areas that crop up during IRS or DOL investigations.

“Typically, it’s a lot cheaper to fix an error before a regulator sees it, rather than after,” Kaleda says. “A self-correction is the way to go, if you can.”

What follow are five key operational processes that plan sponsors legally must always adhere to, observations about the impact the current

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According to law, a plan sponsor must withhold employees' retirement deferrals from their paychecks and deposit the funds—as well as its own contributions—into the retirement trust or participants' individual accounts as soon as is reasonably possible. Plans with fewer than 100 participants have a seven-day safe harbor to make the transaction.

**What has changed.** With many plan sponsors' human resources (HR) departments and their payroll providers suddenly working from home, it may be impossible to carry out established procedures in the same way an employer has in the past. It is important for plan sponsors to confirm they have implemented new procedures to ensure all contributions still get deposited as quickly as possible, says Ari Sonneberg, an ERISA [Employee Retirement Income and Security Act] and employee benefits attorney with The Wagner Law Group in Boynton Beach, Florida.

“Plan sponsors, advisers and recordkeepers have to be in touch regularly during this time, more than they would otherwise, to make sure things are running smoothly,” Sonneberg says. “Things aren't normal. You have employees who have been laid off who may have been overseeing part of the plan. You have to make

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that as a partial plan termination, which requires immediate, full vesting of all participants. [Furloughs](#), however, typically would not trigger a plan termination, Kaleda says.

## 2) Employee Eligibility for Participation

Plan sponsors must make sure they admit all eligible plan participants, according to the terms of the plan. Employers requiring a service period of up to a year prior to eligibility need to track how long an employee has worked—either by hours or elapsed time—and communicate with that employee as soon as he becomes eligible about when and how he can enroll.

“One thing that’s paramount to operating a retirement plan is knowing what the conditions are for participating and what happens when people cross certain thresholds,” says Rachel Faye Smith, a partner in Goodwin’s ERISA and executive compensation practice in Boston.

“What happens when people add hours or lose hours or get put on employer-mandated leave? Each of those has an impact on eligibility to participate in a plan.”

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“Work reductions, like a reduction in hours, could slow down eligibility for the plan, depending on how the plan counts eligibility service,” he adds.

### 3) Distributions

To remain compliant, plan sponsors must have clear processes to confirm participant eligibility for loans or hardship withdrawals, and to make sure their employees borrow no more than regulations permit. Plan sponsors must also alert participants to their need, if any, to take required minimum distributions (RMDs) and then facilitate those distributions.

“Plan violations concerning distributions occur somewhat frequently in a few different forms,” Smith says. When violations occur in a plan loan, “either they’re extending plan loans to people who aren’t eligible or who have hit the maximum number of loans, or the administration of loans gets out of line with what the plan document says.”

**What has changed.** The Coronavirus Aid, Relief and Economic Security (CARES) Act, [passed earlier this year](#), includes several new rules addressing distributions, which plan advisers should discuss with sponsor clients.

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the participant's workplace retirement account. The usual 10% withdrawal penalty is waived. Participants have three years to restore the funds or pay income taxes on them. The legislation also increased the maximum loan amount.

Plan sponsors that opt to make such distributions available must inform participants about whether they are eligible and then be available to answer questions and facilitate both the distributions and their potential repayment.

Additionally, the coronavirus relief act suspended RMD requirements this year, after the SECURE Act pushed the age of mandated RMDs to 72.

#### 4) Plan Testing

Sponsors of a non-safe-harbor plan must run annual tests to make sure their plan is not top-heavy and does not discriminate in favor of the highly compensated employees (HCEs). If a plan fails the testing, the sponsor must either refund excess distributions to the HCEs or make additional contributions on behalf of other workers.

"If a plan sponsor is working with a

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**What has changed.** Employers that are furloughing workers, reducing wages, and cutting or suspending their employer match to 401(k) plans are likely also changing their actual deferral percentage (ADP) or actual contribution percentage (ACP).

In addition, plan sponsors that suspend safe harbor contributions will also now have to perform top-heavy testing, so it is important for plan advisers to talk through the ramifications of such decisions with their clients, says Dave Ragona, director of retirement operations at Human Interest, a firm that provides automated 401(k) plans, in San Ramon, California.

“When you take the safe harbor away and top-heavy testing comes back, it can end up costing a lot more money,” Ragona says. “If you’re doing it to save money, it can be counter-productive.”

## 5) Plan Document Adherence

For plan sponsors, one of the most basic tenets of operational compliance is adherence to plan documents. That means making sure the documents reflect both current regulations and company policy. Any changes to plan

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**What has changed.** Due to COVID-19 restrictions on travel and gatherings, plan sponsors may not be able to hold the retirement plan committee meetings required by plan documents in the same, in-person way they have in the past, but they still need to have those meetings, even if doing so virtually.

Almost one-third of sponsors answering a [PLANSPONSOR pulse survey](#), which targeted respondents to the 2019 PLANSPONSOR Defined Contribution (DC) Survey, said they discussed reducing or suspending their matching contributions; 34% of the nearly 33% had already acted or are likely to do so.

Plan advisers should also make sure that sponsors make necessary amendments to their plan documents right now, including with regard to matching contributions or changing policies that speak to eligibility of new hires.

One exception: Changes to distribution rules under the coronavirus relief package do not require an amendment to plan documents until end of plan year 2022.

“That’s crazy for all of us in the industry who have been taught that you have to administer the plan according to the document terms,”

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the same effect as making the amendment— today, but you don't have to draft and sign the agreement until 2022."

To limit mistakes, however, plan sponsors should still keep records of when and how they implement such provisions. "Get it recorded in a memo or in a committee meeting, so that, when everyone consciously makes a decision, you have something in writing to refer back to," Reish says. "That would be a big part of operating this correctly."

Tagged: hardship withdrawals, required minimum distribution, retirement plan compliance



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**IN PRACTICE** Published in PLANADVISER May/June

# Damage Control in a Downturn

Tips for curating plan sponsors' responses to a crisis.

By *Rebecca Moore*



Art by Linda Yan

Even if retirement plan sponsors have been

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contributions; and both face difficult decisions, trying to balance fiscal responsibilities with fiduciary duties. However, [each financial crisis is unique](#), just as each adviser client is unique.

The effects of the COVID-19 pandemic were recently measured by a [PLANSPONSOR pulse survey](#), fielded among sponsors that responded to our 2019 DC Survey. Findings were that 73% were at least moderately concerned about business/organizational risks. Many sponsors reported they were [considering employee layoffs, furloughs or salary reductions](#).

These concerns were in addition to retirement plan considerations, with one in four thinking about changing their plan's safe harbor status and nearly one-third considering decreasing or suspending employer match contributions. Even greater numbers were debating whether to expand participant loan limits and offer emergency distributions under provisions of the Coronavirus Aid, Relief and Economic Security (CARES) Act.

The results underlined the importance of advisers to plan sponsors during times of crisis. Sixty-seven percent said they have relied on their plan adviser or consultant for insights or guidance on the potential implications to

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defined benefit plans during market downturns—especially during the current one.

## Micros/Startups



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**JOHN K. PALLADINO**  
**401(k) & 403(b) -**  
**Fiduciary Advisers,**  
*San Mateo, California*

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In his book of business, **John K. Palladino**, managing director and investment adviser representative at 401(k) & 403(b) Fiduciary Advisers, has approximately 30 micro/startup 401(k) plan clients with less than \$1 million in plan assets. When there is

an economic downturn, such as the Great Recession of 2008 and 2009, and especially now with the market and business reverberations from effects of the COVID-19 pandemic, “their biggest concern is staying afloat and doing anything they can to save money,” Palladino says.

He says a common question he gets from these plan sponsors is: “How do we turn off our match contributions?” He says, for sponsors that offer a safe harbor 401(k), the procedure entails, at least 30 days before the

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“When going through a tough time like this, people want communication. They want to know what’s going on,” Palladino says. In late March, his firm sent an email blast to clients discussing the pandemic and market volatility. Six attachments addressed topics such as staying calm during bear markets. “These resources were one- or two-page PDFs for clients to post on their intranets or forward to participants, and on the bottom of each was my phone number and email,” he says, adding that all PDF content was run through compliance.

After receiving the email blast, many of the smaller clients asked if Palladino could schedule a webinar to speak to participants in more detail. “We’ve done webinars for clients at no charge, using GoToMeeting for up to 100 participants,” Palladino says. “We talked about the importance of their 401(k). We went through the different topics covered in the PDFs and answered questions.”

He observes that the webinars help plan sponsors fulfill their fiduciary duties without getting into trouble. “We tell them, ‘One reason you have an adviser is you never want to be accused of giving advice.’” Providing the webinars and PDF resources was not only good

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they have never experienced a downturn or they forgot what happened to their account during the Great Recession. Additionally, there have been calls from terminated participants who have the idea that it would be better to roll their assets out of their 401(k) into an individual retirement account (IRA).

“It’s all about offering touchpoints,” Palladino says. “But it’s also about having a specialist for retirement plans and their investments. Plan sponsors and participants feel comfortable working with someone who is knowledgeable and specializes in retirement plans.”

He says some sponsors just have been wanting a “gut check” that they are doing all they should for their plan. “We stress that they can’t control Congress or the stock market; they should focus on what they can control,” Palladino says. The things he can take off sponsors’ worry list, he does. “They have lots to worry about.”

## 403(b) Plans



The entities that will sponsor a 403(b) plan have unique challenges during economic downturns, and they

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*Investment Advisers,  
White Plains, New  
York*

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people's basic needs.

**Daniel R. Casella,**

executive director of

consulting with Strategic Retirement Group, an affiliate of Resources Investment Advisers, says, "Health care, higher education, nonprofit institutions, and K – 12 schools are all in crisis mode to some degree, with health care at the epicenter.

"Health care is unique right now in that, as a business, they already had tight margins and a poor outlook for the future," he says. "I've sat in many board meetings before this crisis where this was discussed."

According to Casella, health-care institutions have never faced margins this tight. "The things they make money from they aren't able to do now. Demand has been pulled away so dramatically, and compensation and benefit costs are a huge spend," he says.

Resources Investment Advisers manages 280 403(b) plans, of which Casella and his team handle 32. He considers his degree in psychology a bonus for managing client anxiety. He has learned that, often, just using facts can allay stress.

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managing it. Downturn or not, they have to uphold a fiduciary process, and clients like it that we get ahead of what they need to do.”

Casella meets with his team each morning, to decide what communications to deliver to clients and how to make them concise. “These daily meetings ensure clients don’t get five different emails from five different people,” he says.

Casella also asks recordkeepers to be sensitive about the information flow. “We ask them to have more regularly scheduled communications with their team, then come to us so we can all be on the same page about what to communicate to clients,” he says.

“Clients get one communication at the appropriate time that is well-thought-out by their recordkeeper/TPA [third-party administrator] and adviser.”

Comparing the crisis caused by COVID-19 to the Great Recession, Casella observes that, while there are some common themes between then and now, 403(b)s have substantially evolved. IRS 403(b) regulations were finalized at the beginning of the Great Recession. “Now, we are also introducing better plan designs, investment menu redesigns and target-date funds [TDFs] to

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relay actions taken that affect participants. Perhaps an especially timely example: A client that eliminated its match during the Great Recession now says it believes this was a mistake. "They said it was a big black eye on the organization," Casella says. "A decision of this kind is more of a concern now that participant retirement outcomes are a focus." "It's important for advisers to have stories to share."

## DB Plans



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**RODGER METZGER**  
*Hooker & Holcombe  
Investment  
Advisors,  
Bloomfield, -  
Connecticut*

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Following a market downturn, the biggest challenge for defined benefit (DB) plan sponsors is the direct effect it will have on their balance sheet and on contributions that need to be made to their DB plans, says **Rodger Metzger**, president and chief investment officer (CIO)

of Hooker & Holcombe Investment Advisors. Hooker & Holcombe is a registered investment adviser (RIA) affiliated with Pensionmark and has about 30 DB plan clients.

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“When the market goes down, it hurts assets, and when interest rates go down, it hurts liabilities; plan sponsors experience the ultimate double whammy,” he says. “In the past five years, DB sponsors were hoping assets would keep going up and the Fed would increase rates, and they would be able to terminate their plan with minimum contributions. With the current financial crisis, their hopes have gone away. Right now, they have weaker business prospects combined with expectations of making increased DB contributions and maintaining their plan for several more years.”

In addition, he says, unlike the Great Recession—which felt like a “relentless move down-market”—the crisis caused by COVID-19 was so “fast and furious” in how it developed that clients became especially concerned: notably, small DB plans. “We try to hand-hold individual committee members and put things into a larger perspective.” These committee members think more like retail investors than institutional investors, Metzger says. “We’ve increased communications just to calm anxiety.”

He offers as an example a \$30 million DB plan that he typically meets with quarterly. “In mid-

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committee also normally take a much longer view of individual funds and separate accounts. “We look at five-year periods of time because that shows how managers work in an economic cycle,” he explains. But now, Metzger and the committee are scrutinizing funds that were lagging, particularly on the fixed-income side.

As a general rule, his clients’ portfolios are rebalanced quarterly to strategic targets, but in the Great Recession, when it appeared the economy was stalled, Hooker & Holcombe suspended its rebalancing program and relied just on clients’ well-diversified portfolios. With the pandemic, though, the downturn was faster; there was a more responsive fiscal policy; and the market has been moving up and down more, in response to short-term information. For some plans, Metzger’s firm has accelerated rebalancing while others have stayed on the quarterly schedule.

In addition to hand-holding after such an “unexpected big deal,” Metzger makes sure meetings with clients now are face to face. “There’s something to be said about looking at someone’s face to help ease anxiety,” he says.

Tagged: 403(b) plan, DB plan, market volatility,

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