The Next Big Crisis in 401(k) Plans - February 24, 2010
By Nora Bethman, ERPA

Okay, so your account balance is coming back up a little bit in your 401(k) plan after the economic meltdown last year. Can you go back to status quo? Absolutely not. With all that's been written about the investments and fees in 401(k) plans, there's another, overlooked aspect to 401(k) plans which will become the next big problem - legal compliance. Your 401(k) plan may not be in compliance with the laws. And you, the participants, are being shortchanged because of it.

Some background: Congress passes laws to govern the operation on 401(k) plans, most notably ERISA - the Employee Retirement Income Security Act of 1974, and more recently, the Pension Protection Act of 2006. Companies get a large tax break for offering a retirement plan of any kind; however, with the tax break comes some responsibility for companies to provide meaningful retirement benefits to workers, particularly lower paid workers. To that end, this body of laws sets minimum standards for participation, contributions, vesting, and reporting for qualified pension and profit sharing plans.

To be fair, over time, there has built up such a patchwork of laws as to become extremely complicated. Such complication can lead to mistakes. Many companies outsource the maintenance of their 401(k) plans to Third Party Administrators and Recordkeepers. But many 401(k) recordkeepers simply do not understand the laws, have too much work and not enough qualified employees to do it, or simply make mistakes. Worse, 401(k) plans can have one firm handling investments, another keeping records, a third company to process distributions, and a fourth to prepare tax forms. All this data switching from company to company can result in a loss of records and mistakes. And it could be happening to YOUR ACCOUNT.

And nobody's watching. The Internal Revenue Service (IRS) and Department of Labor (DOL) do not have the staff and budget to oversee the operation of every company's 401(k) plan. Yes, they perform random audits, but those are few and far between, and many times by the time the auditors arrive, the damage has been done and the participants have been shortchanged for years.

I have seen employees not being given company contributions due to mis-calculations or refusal to comply with the laws, mis-directed and embezzled deposits of employees' 401(k) salary deferrals into the plan, partial or full account balances accidentally and unknowingly left behind when the employee leaves the company or takes a withdrawal from the 401(k) plan, and other serious errors which result in thousands of dollars of hard earned pay going missing from participants' 401(k) accounts.

And no one knows it.

What can the average worker do to protect himself or herself?

1. Pay attention to your account statements. Get a statement as of December 31 each year and compare the total 401(k) deposits to those shown in box 12 on your W-2 form. Do the amounts match? If not, why not? Find out from your Benefits Department. It could simply be a timing difference in between the pay date and the date the contribution is deposited into your account. Or it could be that your 401(k) salary deferrals never made it into your account. Is there any company contribution - a match, safe harbor contribution, or profit sharing contribution? Ask how it was

calculated. If it's an easy to understand percentage, try to do the math. Does it work out? Some company contribution formulas may be too complicated for a layman to figure out on a calculator, but you should still ask.

2. Read the Summary Plan Description (SPD) and Summary Annual Report (SAR) provided by your Benefits Department. They're not exactly page turners, but they can provide valuable insight. Is there a total employer contribution shown on the SAR for the year, but you didn't get a share of it? Why not? Does the SPD state you can join the plan 6 months after hire, but no one offered you enrollment forms or told you how to obtain them from a website, and you've worked there 3 years? Try to learn about the different types of company contributions possible in the plan. Even if you don't want to join the 401(k) plan and make salary deferrals, you still may be entitled to a company contribution. Even if the company doesn't make a contribution every year, they may be **required** to give you some minimum deposit because the plan is top heavy, is a safe harbor plan, or has failed testing. Find out your rights.

3. If your native language is not English, and it is difficult to understand these documents, ask your benefits department to provide these reports to you translated into your native language, or find someone who can translate for you. You need to understand your account.

4. Try to talk to your co-workers. If John in your department, who's been there only a year and does the same job as you do, got a company profit sharing contribution, and you've been there 4 years and did not get a contribution, find out why. It may be because you did not work enough hours and he did, but it may be because there's a mistake in the plan calculation and you got left out.

5. Track the deposits going into your 401(k) account. At least once a year, if not quarterly or every pay period, compare the 401(k) shown on your pay stub to the amount deposited into your 401(k) account. Did you have $50 withheld from your pay every 2 weeks, but only $20 is making it into your account for the last 2 months? It could be accidentally mis-directed into someone else's account because of a transposed account number, or the employer could be using it to pay vendors, a clear law violation. Keep track of your deposits. Look to make sure the company contribution was deposited if you got a notice that it would be. Companies often only deposit employer money once per year, and it could take as much as 10 months after the end of the year to do so, but pay attention to a larger than normal deposit. Also check if there are any unfamiliar withdrawals from your account. It could be fees or other charges, but it could be a mistake.

6. Educate yourself. The IRS, DOL, and Pension Benefit Guaranty Corp. (PBGC), all government agencies, operate websites with helpful information about what to expect with a 401(k) plan, lists of people with unclaimed pension money, and explanations of pension laws. Every time you look at your 401(k) account to rebalance your portfolio, check your investment performance, or speak with the broker, you should also check these websites for changes in legal issues, too. Don't just pay attention to the investments.

7. Contrary to popular opinion, you should not leave your old 401(k) with your former employer when you leave a job. The best choice is to either roll it over to your own personal IRA, or your new employer's 401(k) plan, if your new plan so allows. Yes, 401(k) plans are protected from creditors whereas IRAs are not; and yes, your old plan may have better investment choices in the plan than your new company; or your new company may make you wait a year before you can roll over your funds into their 401(k) plan; but I have seen too many participants lose thousands of

dollars because they lose track of the account. Out of sight, out of mind. People move or change their name and stop receiving account statements, or the company may go out of business or merge with another company and change the business name, or simply change investment providers/recordkeepers. In a few years, if you're lucky, your 401(k) money may end up in the state unclaimed property department, the PBGC, with a completely different company's 401(k) plan, or with a conscientious Third Party Administrator who tries diligently to locate you. If you're not so lucky, your 401(k) account balance may simply revert back to the company, and the onus is on you to prove who you are and that the money belongs to you. Or if you should die suddenly, your beneficiaries may have to try to locate this money and prove they're entitled to it. I once saw a 401(k) account of well over $250,000 sent to a state's unclaimed property department. It was determined that the account owner had died, but no beneficiaries could be located. How sad that someone's hard earned lifetime earnings accumulation was wasted in such fashion. Which leads to item #8:

8. Keep your statements, company handouts, Summary Plan Descriptions, investment forms, paycheck stubs, etc. in one place! Do not discard these items. Make sure your family knows where to locate them if something should happen to you. Ask your company's benefits department periodically to verify your listed beneficiary(ies) on your 401(k) account. Many years from now when you are retirement age, you may have to prove that you in fact made 401(k) salary deferrals or that you worked for a particular company if something happens to your 401(k) account. Or your beneficiaries may have to prove this. You do not want to reach retirement age and discover that your 401(k) account has disappeared. Also, many court battles between the first and second wife, or the kids and the second wife, occur when a plan participant gets divorced but forgets to change the beneficiary on his 401(k) account.

9. If you've changed your name, or use different names, be consistent on your 401(k) and other retirement accounts. Don't use nicknames on enrollment and beneficiary forms. Make sure the benefits department or recordkeeper has your old and new names, and lists both names on your statement, to avoid confusion.

10. Get help. If you do suspect there's a problem, or you've talked with your boss or benefits department several times and still do not understand, try contacting the Third Party Administrator or Recordkeeper, an accountant or more knowledgeable friend or relative, or the IRS or DOL; your State Representative or Congressperson; or if worse comes to worse, a benefits attorney to explain your statement or plan paperwork to you. It may be worth it to pay a professional for a one-time consultation regarding your plan than to discover that you've been missing out on contributions for the last 15 years because your employer forgot to put your name on the list. Don't sign things you don't understand.

11. You will have more for retirement if you in fact take advantage of what the plan offers. Sign up, and contribute even a minimum amount from your pay. You may get a company match if you do. Try not to take it out as a loan or withdrawal. Yes, times are tough now, but they'll be tougher when you are too old to work and have no savings.

Ms. Bethman has been a 401(k) third party administrator for over 20 years. For a small fee, she can review your account statements and plan records to check for problems and explain your plan's features. She may be contacted at 847-808-0940 or at nebspensions@hotmail.com.