

## THE FORCE AWAKENS ON 2016

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The ball dropped on 2016, but don't drop the ball on your benefit plan compliance. As part of our annual tradition, we're pleased to present this year's Top Ten New Year's Countdown for the reading pleasure of our fellow ERISA geeks. You may remember last year's Top Ten list was set to Pop Culture themes that dominated 2014? Well, we've decided to embrace the Star Wars fever that currently has a firm grip on our society and devote our entire list to Star Wars'-themed tips. Get your lightsabers ready...

1. This epic space opera list starts just where you'd expect it: A long time ago in a galaxy far, far away (called Congress)...there was born a law called the Patient Protection and Affordable Care Act. The law made it through infancy and even toddlerhood...but then it required reporting of a kind never seen before. If you're reading this article, you likely have made it through the data collection process and you're poised and ready to issue/file your first 1094s and 1095s. If not, hurry hurry as the January 31<sup>st</sup> deadline is very quickly approaching. An extension may be requested, if necessary.
2. The determination letter program dies and the Force Awakens. Yes, with the determination letter program all but gone, internal document compliance audits are going to be more important. If you haven't already, catch the latest Star Wars film in the theater, then think long and hard about how your plan will retain its documentary compliance as you coast off into the future (in the millennium falcon). One thought – engage a law firm on the same five-year remedial amendment period – to perform a document audit and advise if any interim amendments are missing/improperly documented.
3. May the force be with you, and may you never forget the second most important day of the year – March 15th (aka “409A day” for payments made under the short-term deferral exemption). We recommend marking a big red **X** on your calendar not to miss this one.
4. Luke starts his life as an orphan, separated from his departed mother and his fallen father. It could be called an act of serendipity that leads him to discover a desperate message within the droid, R2-D2. It was that message that changed the trajectory of Luke's life from that day forward. Don't let your plans becomes orphans – either literally or figuratively as you might not

benefit from a serendipitous intervention. Maintaining employee benefit plans is hard work. Plan fiduciaries need to be engaged to avoid drifting off into the abyss of the galaxy. The government is bound to come knocking (and assessing taxes or penalties) if this happens. Remember that an engaged, procedurally prudent process is the foundation of discharging the prudent expert fiduciary duty set forth under ERISA. Let's start with quarterly meetings.

5. A central theme adopted by Lucas in the Star Wars series is nature over technology. Think of it – the Ewoks overtake the Empire on Enjor. With incredibly primitive weapons, they defeat the technologically-advanced imperial troupers. What's the lesson? Getting back to the basics. It's easy to get caught up in the next big trend in retirement plan consulting, plan design, annuity structure, you name it. But, peeling away the layers, the plan document is our guide. We start there and build with what the delegated fiduciaries deem to be in the best interest of the participants and beneficiaries. In all cases, start with the simple questions – what does the plan say? And is this in the best interest of our plan members?
6. What's the danger of being on auto-pilot? An X-wing fighter may be able to launch into action with the simple push of the button from its pilot, but to which galaxy is it headed? It's easy to get caught in the rut of "that's the way we've always done it" mode as a plan fiduciary. We take this time to recommend a step back. As a plan's fiduciary it is important to develop and regularly consult a thoughtful strategy for plan compliance – not only the big things (e.g., is our plan investment structure appropriate for our demographic), but also the little things (e.g., are we giving the right disclosures in our new hire and open enrollment packets?).
7. Every fiduciary needs a good co-pilot – you know, a Chewbacca (or "Chewie", as he was known by his friends) to Han Solo's ship – but you cannot expect your co-pilot to excel without receiving training. When a new co-pilot joins the fiduciary team/committee which has authority over plan matters, make sure that he/she receives training. Also, we recommend that plan fiduciaries actually read the governing plan documents and governance materials to ensure they actually understand the plan and their responsibilities. Best practice requires annual fiduciary training.
8. And here's where Darth Vader went wrong. He thought – and declared – that "[t]he Empire has a legion of loyal soldiers that are in endless supply." This lack of respect for his minions should not be adopted by plan fiduciaries in their dealings with plan participants. No, no. Think of it: Just as Stormtroopers should be recognized as elite soldiers of the Empire, all plan participants should be recognized as elite members of the plan mission. This means plan fiduciaries must engage in a thoughtful review of plan design and fees to ensure they appropriately benefit and protect plan participants. Sure, it's not 2007 and plan fees aren't the only thing being discussed by the DOL and the plaintiffs' bar, but plan fiduciaries should not relax their efforts to secure what it deems to be the best deal for the plan and its participants (given the services to be provided). After striking the initial deal, plan fiduciaries should periodically monitor all fees charged against the plan's assets to ensure reasonableness.

9. The Force is strong in some families. You can feel the power pulsing just beneath the surface... but remember, when the Force attempts to pull you to choose a family member or other related party to perform services for your company's 401(k) plan, resist the Force and remember to avoid conflicts of interest and abide by your duty of loyalty as an ERISA fiduciary. It's easy to think – "what's the big deal, your sister General Organa (or Princess Leia, if you prefer) is great at her job and can handily do what we need" – but that is the Dark Side talking. A thorough conflict of interest and prohibited transaction analysis is necessary before going this route.
10. And finally – it's time for you to weigh in: Who would win in a battle between the Galactic Empire and Rebel Alliance? Okay, and who is your money on between the Department of Labor and the judiciary? We may know the answer on the latter sooner than the former with the new stated-based IRA guidance and fiduciary rule both catching a lot of colorful commentary from the private sector. 2016 may bring answers on whether the DOL's interpretation of ERISA (i.e. to permit such state-based arrangements) will be upheld...

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