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employee benefits & executive compensation law

in focus

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Understanding What the ERISA Service Provider Regulations Mean for Employers

Employers who sponsor pension plans, 401(k) plans and other defined contribution and defined benefit retirement plans should be aware of the requirements of the recent final service provider fee regulations issued by the Department of Labor under Section 408(b)(2) of ERISA. If a plan fiduciary fails to comply with its obligations under these rules, the DOL can assess civil penalties against the plan sponsor/fiduciaries, and IRS excise taxes may apply.

What do the regulations require?

The regulations require plan service providers to furnish the plan with (1) a description of the services they will provide to the plan and (2) a description of all direct and indirect compensation to be received by the service provider in connection with the services provided to the plan.

Examples of service providers covered by the final regulations include investment advisors, recordkeepers, third-party administrators, auditors, and actuaries. These and any other service providers who receive direct or indirect compensation in excess of $1,000 must disclose their fees in accordance with the final regulations.

(Note: Direct compensation is compensation paid from the plan's assets. Indirect compensation is compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate.)

When do the regulations take effect?

Plan sponsors should receive a copy of fee disclosures from all covered service providers on or before July 1, 2012. After that, plan sponsors should receive a copy of the fee disclosure before entering into, or renewing or extending, an agreement or contract with a service provider.

What are the employer's obligations under the regulations?

If a plan does not receive the disclosure as required, the plan must request in writing that the service provider furnish the disclosure. If the service provider fails to provide the plan with a fee disclosure within 90 days of the request, the plan has 30 days to notify the Department of Labor.

The plan must also determine whether it is prudent to continue the contract with a service provider that has failed to disclose its fees in accordance with DOL requirements.

If the plan fails to request the fee disclosure, fails to notify the DOL in the event the requests is unfulfilled, and does not determine whether it is prudent to continue the contract with the non-compliant service provider, then the arrangement with the service provider will violate ERISA's prohibited transaction rules. The Department of Labor can assess a civil penalty against plan fiduciaries who violate ERISA's prohibited transaction rules, and IRS excise taxes may apply.

The DOL has indicated that the amount of this civil penalty could be equal to the amount of the fees that went "undisclosed." Thus, for example, if a sponsor pays a covered service provider $25,000 per year for services, and the service provider receives an additional $60,000 in indirection compensation from the plan that goes undisclosed, the penalty to the sponsor could be to pay $60,000 to the plan. Thus, obtaining this disclosure is critically important.

ACTION ITEMS:

- Determine who the plan's service providers are and whether they are required to provide a written fee disclosure.
- Establish a system for confirming that all required disclosures have been received and reviewed. Determine who is responsible for determining what, if any, fee disclosures have not been provided, for requesting fee disclosures and for notifying the DOL, if necessary.
- Work with benefits counsel to confirm that the fee disclosures satisfy the legal requirements of the final regulations and to ensure that all necessary steps are taken to avoid liability under ERISA.

For more information about the ERISA Fee Disclosure Regulations and Fiduciary Duty requirements, please contact:

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