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employee benefits & executive compensation law

in focus

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Complying with the Participant Disclosures Regulations

What is required of plan fiduciaries?

Recently the Department of Labor released final regulations adding new disclosure obligations of ERISA plan fiduciaries. In short, the new regulations require the plan administrator to disclose to plan participants certain information related to the plan and the investments offered by the plan. The regulations apply to plan administrators of individual account plans whose participants are permitted to direct the investment of their plan accounts. The regulations are effective for plan years beginning on or after November 1, 2011 (January 1, 2012 for calendar year plans).

(See http://www.wkalegal.com/publications/Investment_Disclosure_Article.pdf for more information on the new regulations.)

It is important to note that the requirements in the new regulations are fiduciary requirements. If the plan administrator does not comply with the regulations, then it can be held liable for breach of ERISA fiduciary duty.

Some of the disclosures required by the new regulations include information that plan administration fiduciaries typically do not track, such as the total annual operating expenses of the plan's investment options. However, some employers are finding that their third-party administrators (TPAs) intend to prepare and provide this information to plan participants.

This is a good start. But is it enough?

In short – no. Blind reliance on the plan's TPA's provision of this information to participants is not sufficient.

According to the regulations, the "plan administrator" has the obligation to disclose the required information to plan participants. As background, the plan administrator is either named in the plan document or, if not so named, is the plan sponsor. The plan administrator is typically not the same entity or person as the plan's TPA. The plan administrator is also a plan fiduciary to the extent it exercises discretionary responsibility with respect to administration of the plan, and most plan administrators are plan fiduciaries. The plan's TPA generally is not a plan fiduciary, unless it exercises discretion over plan administration.

The plan administrator may delegate its disclosure obligations under the new regulations to the plan's TPA, but the delegation alone does not relieve the plan administrator of liability -- the plan administrator must act reasonably and in good faith when relying on the information provided by its vendors.

Thus, having an understanding of the plan fees and obtaining the necessary information and disclosures from the plan's TPA are the first steps in satisfying the requirements in the new regulations. However, distribution of the disclosures to participants without proper review can expose plan fiduciaries to liability. Thus, we recommend that plan administrators consider the following:

ACTION ITEMS:

- Review all information from the TPA that is to be provided to participants and determine whether it appears accurate and correct (e.g., there are no obvious errors and no information that the plan administrator knows is not correct). Unreasonable (i.e., blind) reliance on the information received from the TPA or other plan service provider can expose the plan administrator to fiduciary liability.

- Have legal counsel review the participant disclosure(s) to ensure it contains all of the information required to satisfy the ERISA fiduciary disclosure requirements under the new regulations.

- Consider updating its contracts with its TPA and other service providers, as applicable, to (i) properly delegate responsibility for complying with the new disclosure requirements and (ii) obtain indemnification for compliance failures. Plan administrators may also consider obtaining a representation from the TPA or other service provider that the information provided to the plan participants is true and accurate.

For more information on the ERISA fiduciary disclosure obligations, please contact:

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