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Participant Notices — An Analysis of Current Disclosure Requirements

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Introduction

In 1977, the U.S. Department of Labor (DOL) issued final regulations establishing the requirements under the Employee Retirement Income Security Act of 1974 (ERISA) with respect to the content and issuance of summary plan descriptions.¹ Those regulations were among the first to provide guidance on providing notices to participants in ERISA-governed employee benefit plans.

Since 1977, the use of notices to inform participants of rules regarding their employee benefit plans has increased dramatically. In 1982, the DOL released a one-page reporting and disclosure guide.² The guide referenced two notices that must be sent to participants: a summary plan description, and a summary annual report.³ Twenty-six years later, in 2008, the DOL released an updated 21-page reporting and disclosure guide.⁴

The increase in the number of notices that must be provided to participants has made plan administration more difficult. A participant in a 401(k) plan and a health plan could receive in excess of 20 different notices from the plan sponsor or plan administrator (jointly referred to herein as the “notifier”)⁵ related to the employer’s benefit plans.

This article identifies the key notices that are required to be provided to participants under an ERISA-covered defined contribution plan and a group health plan and briefly discusses the purpose for each notice. Also, this article reviews the applicable penalties imposed for not providing a notice in a timely manner (or not responding to a participant request for a document). This article also explains current plan administration issues caused by the large number of participant notices and offers strategies for resolving the issues. This article concludes with observations on how the current process of providing a large number of notices ineffi-

¹ *Summary Plan Description Requirements*, 42 Fed. Reg. 37182 (July 19, 1977).

² *Reporting and Disclosure Guide for Employee Benefit Plans*, U.S. Dept. of Labor, Nov. 1982.

³ *Id.*

⁴ *Reporting and Disclosure Guide for Employee Benefit*

Plans, U.S. Dept. of Labor, Oct. 2008, available at <http://www.dol.gov/ebsa/pdf/rdguide.pdf>.

⁵ Participants may receive certain notices from either the plan sponsor or plan administrator, both of which are referred to as the “notifier.”

ciently educates participants on the provisions contained within a specific benefit plan.

Notices Applicable to Both Health and Welfare Plans and Defined Contribution Plans

Summary Plan Description (SPD)

The SPD provides an overview of the provisions contained in the plan document.⁶ The primary purpose of the SPD is to communicate to participants certain plan provisions, some of which concern the determination of benefits. Given that participants are unlikely to see or read the plan document, the SPD is often relied on by participants when making important decisions, such as when to retire. Accordingly, the terms of the SPD are required to be written in a manner calculated to be understood by the average plan participant. In addition, the terms of the SPD must be sufficiently comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan.⁷

The SPD must be provided to participants at different times during the life of a plan. First, the SPD must be provided to participants upon the initial adoption of the plan.⁸ The SPD is due no later than 120 days after the later of the effective date or the plan's adoption date. Thus, the due date depends on the occurrence of the effective date of the plan and the adoption date. As a consequence, the due date will likely be determined based on the plan terms or corporate governance.

Plan administrators should make sure to check the date the plan is adopted and when it is effective so as not to miss the due date. For example, an SPD must be provided to participants no later than 120 days after Company X adopts its new 401(k) plan if the plan, as adopted, is retroactively effective three months prior to the plan's adoption date. The correct due date may be overlooked when a new plan is offered because the individuals responsible for administering the plan are busy with various other administrative concerns, such that distribution of the SPD may be overlooked.

Second, an updated version of the SPD must be provided after certain plan amendments are adopted. Currently, the DOL regulations provide 21 sections of information required to be included within an SPD.⁹ After a plan amendment is adopted that affects a term that must be included in the terms of the SPD, a new SPD must be provided to participants. This disclosure requirement, however, is not as onerous as it appears because the updated SPD is not due until 210 days after the end of the plan year.

Third, the notifier must provide the SPD to all new participants within 90 days of becoming a participant.¹⁰

It is the best practice to keep the SPD current for recent plan changes so that it may be issued when required. This is especially true today given that many employers post their SPDs on an intranet effectively making it available or distributed at all times. A participant who receives the SPD may rely on the terms provided under the plan, even if the SPD contains terms different from the plan document. To avoid confusion and potential litigation, the SPD should be reviewed to verify that benefit and administrative procedures reflect the current terms of the plan.

Summary of Material Modifications (SMM)

The notifier is required to issue an SMM to participants and to beneficiaries who are receiving benefits under a pension plan. The SMM is a summary of plan modifications.¹¹ There are generally two types of plan changes that create a need to issue an SMM. First, an SMM is required when a plan adopts a material modification. Second, an SMM is required upon the adoption of a change to the information that is required to be disclosed in the SPD.

The SMM is a separate document from the SPD. The SMM must be provided within 210 days after the end of the plan year in which the change(s) was adopted.¹² It is important to understand that the due date is determined with reference to the date of the adoption of the change, not the effective date. This is true regardless of whether an amendment is prospectively or retroactively effective. Like the SPD, the SMM should be written in a manner that the average plan participant can understand.¹³

There are a few exceptions to the general SMM filing requirements. If there is a modification or change to a group health plan that is a material reduction in covered services or benefits, a summary of the change must be furnished to participants and beneficiaries within 60 days of the adoption of the modification.¹⁴ Providing an updated SPD in lieu of an SMM to the participants within this time frame would likewise satisfy the SMM filing requirement.¹⁵

Summary Annual Report (SAR)

The SAR summarizes the financial information that is disclosed on the Form 5500.¹⁶ Notifiers are required to annually issue a SAR to plan participants and to beneficiaries who are receiving benefits. The SAR is due within nine months after the end of the plan year.¹⁷ An exception to this general rule applies to notifiers who file a Form 5558 (or other approved extension), which extends the deadline for filing the Form 5500 annual report. In cases where a plan extends the deadline for filing an annual report, the SAR is due within two months after the extended due date for filing the Form

⁶ ERISA § 104, 29 U.S.C. § 1024.

⁷ 29 C.F.R. §§ 2520.102-2 and 2520.102-3.

⁸ *Id.*

⁹ 29 C.F.R. § 2520.102-2.

¹⁰ *Id.*

¹¹ 29 C.F.R. § 2520.104b-3.

¹² *Id.*

¹³ *Id.*

¹⁴ 29 C.F.R. § 2520.104b-3(d).

¹⁵ 29 C.F.R. § 2520.104b-3(b).

¹⁶ 29 C.F.R. § 2520.104b-10.

¹⁷ 29 C.F.R. § 2520.104b-10(d).

5500.¹⁸ For plans with a calendar year plan year, notifiers who take advantage of the Form 5500 extension will need to issue a SAR by December 15th of the year following the year to which the information in the SAR relates.

It is important to note that defined benefit plans are no longer required to provide a SAR to participants and beneficiaries because of the obligation to provide an annual funding notice.¹⁹

Health Plan Notices

Special Enrollment Notice

The special enrollment notice describes the health and welfare plan's special enrollment rights, including the right to enroll within 30 days following the loss of other coverage.²⁰ This notice must be provided on or before the date an employee is eligible to enroll in the health and welfare plan.²¹ The DOL has provided sample language.²² The special enrollment notice may be provided in the SPD.²³

Special Enrollment Notice for Lifetime Limits

This special enrollment notice relates to the elimination of lifetime limits on group health plans. The recipient of the notice is an individual whose coverage or benefits ended because he reached the lifetime limits, and who becomes eligible for benefits not subject to the lifetime limits on the first day of the first plan year beginning on or after Sept. 23, 2010.²⁴ The notice informs the individual of the lapse of the lifetime limit and of his eligibility for benefits under the plan.

Michelle's Law Notice

Michelle's Law prohibits a group health plan from ceasing coverage of a student who is receiving coverage because of his status as a student and loses coverage due to illness or injury.²⁵ The notice summarizes the continuation coverage that the individual receives while on medically necessary leave as provided under Michelle's Law.

Certificate of Creditable Coverage

The certificate of creditable coverage is provided to a participant who loses coverage under the health plan and describes the health plan's creditable coverage.²⁶

Initial COBRA Notice

The initial COBRA notice is provided to a participant who commences health plan coverage with the employer and describes the right to purchase temporary health

care if coverage under the plan is lost due to certain qualifying events.²⁷ An employer does not have to provide a separate notice if the required information is contained in the SPD.²⁸ The notice must be provided to the participant and, if applicable, the participant's spouse.²⁹ Similar to the SPD and SMM, the notice must be "written in a manner calculated to be understood by the average plan participant."³⁰

COBRA Election Notice

The COBRA election notice is provided to qualified beneficiaries upon the occurrence of a qualifying event, triggering the ability to purchase temporary health care coverage.³¹ The notifier must provide this notice within 14 days of being notified of a qualifying event.³² This notice must be "written in a manner calculated to be understood by the average plan participant."³³ According to the regulations, there are 14 different items of information that must be included in such notice.³⁴ In addition to this notice, the DOL created two additional notices related to COBRA: (1) the notice of unavailability of continuation coverage; and (2) the notice of termination of continuation coverage.³⁵

General Notice of Pre-Existing Condition Exclusion

The general notice of pre-existing condition exclusion is provided in the enrollment package that eligible employees should receive upon employment (if eligible to participate in the plan).³⁶ The Patient Protection and Affordable Care Act of 2010 changed the pre-existing condition requirements, thus notifiers must modify the terms of the notice in the event their plan contained a pre-existing condition exclusion.³⁷

Individual Notice of Period of Pre-Existing Condition Exclusion

The individual notice of period of pre-existing condition exclusion states when a specific pre-existing condition exclusion applies after completion of analysis of creditable coverage.³⁸ This notice must be provided immediately following the determination of creditable coverage.³⁹

Women's Health and Cancer Rights Act Notice (WHCRA Notice)

The WHCRA Notice describes surgeries and other procedures that are available to female participants and

²⁷ *An Employer's Guide to Group Health Continuation Coverage Under COBRA*, U.S. Dept. of Labor, Sept. 2005, at 7, available at <http://www.dol.gov/ebsa/pdf/cobraemployer.pdf>.

²⁸ 29 C.F.R. § 2590.606-1(e).

²⁹ 29 C.F.R. § 2590.606-1(a).

³⁰ 29 C.F.R. § 2590.606-1(c).

³¹ 29 C.F.R. § 2590.606-4.

³² 29 C.F.R. § 2590.606-4(b).

³³ 29 C.F.R. § 2590.606-4(b)(4).

³⁴ *Id.*

³⁵ 29 C.F.R. § 2590.606-4(c) and (d).

³⁶ 29 C.F.R. § 2590.701-3(c).

³⁷ See 29 C.F.R. § 2590.701-3(c)(3)(i) (the definition of pre-existing condition exclusion was changed, effective August 27, 2010).

³⁸ 29 C.F.R. § 2590.701-3(e).

³⁹ *Id.*

¹⁸ 29 C.F.R. § 2520.104b-10(c).

¹⁹ ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3).

²⁰ 29 C.F.R. § 2590.701-6(c).

²¹ *Id.*

²² 29 C.F.R. § 2590.701-6(c).

²³ *Health Benefits Coverage Under Federal Law*, p. 64, available at <http://www.dol.gov/ebsa/pdf/CAG.pdf> (last visited November 23, 2010).

²⁴ 26 C.F.R. § 54.9815-2711T.

²⁵ ERISA § 714(b).

²⁶ 29 C.F.R. § 2590.701-5.

covered by the plan.⁴⁰ This notice must be furnished upon enrollment in the plan and annually thereafter.⁴¹

Qualified Medical Child Support Order Notice (QMCSO Notice)

The QMCSO Notice states that the notifier of the plan received and qualified a medical child support order to provide health coverage to a participant's non-custodial children.⁴²

Defined Contribution Plan Notices

It is important to note that the notice requirements discussed in the following section apply only to defined contribution plans, and do not cover the notice requirements applicable to defined benefit plans. Defined benefit plans are required to provide several notices that defined contribution plans do not. Although this article does not discuss the notice requirements for defined benefit plans, a notifier who is responsible for both a defined contribution plan and a defined benefit plan should be aware of and distinguish which notices must be provided to participants and other parties under each plan.

Individual Benefit Statements

Individual benefit statements provide participants and beneficiaries with a snapshot of the financial status of their individual account. More specifically, these statements disclose the total accrued benefit of an individual's account, as well as an explanation of the account activity by investment option.⁴³ The timing requirement for issuing individual benefit statements is determined by whether an individual account plan allows participants to direct the investment of their own account. If a plan allows participants and beneficiaries to direct their investments, then notifiers are required to send a statement at least quarterly.⁴⁴ On the other hand, a notifier only needs to send a statement annually if participants and beneficiaries are not permitted to direct the investment of their account balance.

Safe Harbor Notice

A defined contribution plan with a 401(k) or 401(m) feature that elects to utilize the safe harbor for a particular plan year must issue a safe harbor notice.⁴⁵ A safe harbor election is made prior to the beginning of

the plan year to which it relates. The notifier must issue the safe harbor notice before the plan year begins.⁴⁶ The earliest it may be sent is 90 days prior to the beginning of the plan year. The latest the notice may be sent is 30 days prior to the beginning of the plan year. In general, this means that a calendar year plan year electing to take advantage of a safe harbor needs to issue the notice during October or November before the plan year begins on January 1st. In some cases, the notifier may decide to combine the Safe Harbor Notice with the QDIA Notice, as described below.

Currently, the following types of safe harbor provisions are available: (1) non-elective contribution safe harbor;⁴⁷ (2) matching contribution safe harbor (basic or enhanced); and (3) qualified automatic contribution arrangement safe harbor. Each type of safe harbor requires a separate type of notice.

Notice of Investment Blackout Period (Blackout Notice)

The Blackout Notice informs participants of a period during which the right to direct or diversify investments is restricted due to a blackout period.⁴⁸ A blackout period is any period of more than three consecutive business days during which certain rights, including the right to obtain a plan loan or distribution, are suspended, limited or restricted.⁴⁹ For example, a blackout period usually occurs during a post-acquisition merger of the acquired companies plan into the buyer's plan.

Notifiers should begin planning for the notice when the occurrence of a blackout period is apparent. Participants must be provided with the Blackout Notice at least 30 days, but no more than 60 days, before the blackout period.⁵⁰ Early planning is important because the notifier should have ample time to gather and ascertain certain information, such as the specific investment rights affected by the blackout period, that must be included in the Blackout Notice. Furthermore, the notifier needs to make sure that all recipients are identified. For example, in the case of a 401(k) plan that contains employer securities, the Blackout Notice must be provided to certain directors and executives who hold employer securities.⁵¹ Note that such individuals must receive the notice regardless of whether they are participants in the plan. The directors and executives are required to receive the notice if they acquired employer securities in connection with service as a director or executive.⁵² The purpose of providing the notice is to

⁴⁰ ERISA § 713(b), 29 U.S.C. § 1185b(b); *Your Rights After a Mastectomy: Women's Health and Cancer Rights Act of 1998*, U.S. Dept. of Labor, June 2006, available at <http://www.dol.gov/ebsa/pdf/whcra.pdf>.

⁴¹ ERISA § 713(b); *Your Rights After a Mastectomy: Women's Health and Cancer Rights Act of 1998*, U.S. Dept. of Labor, June 2006, available at <http://www.dol.gov/ebsa/pdf/whcra.pdf>.

⁴² ERISA § 609(a)(5)(A), 29 U.S.C. § 1169(a)(5)(A).

⁴³ ERISA § 105(a)(2), 29 U.S.C. § 1025(a)(2).

⁴⁴ ERISA § 105(a)(1), 29 U.S.C. § 1025(a)(1); EBSA Field Assistance Bulletin No. 2006-03, 12/20/2006. In addition, in certain instances, a notifier may be required to supply an individual benefit statement upon a request made by a beneficiary. ERISA § 105(a)(1)(A)(iii), 29 U.S.C. § 1025(a)(1)(A)(iii).

⁴⁵ 26 C.F.R. § 1.401(k)-3(d).

⁴⁶ *Id.*

⁴⁷ The content of this safe harbor notice will vary depending on whether or not the plan waits to see whether it will make a safe harbor contribution. 26 C.F.R. § 1.401(k)-3. If the plan waits to see whether it will make a safe harbor contribution, then the notice must specify that the plan may be amended during the plan year to include the safe harbor non-elective contribution and that, if the plan is amended, a follow-up notice will be provided.

⁴⁸ ERISA § 101(i), 29 U.S.C. § 1021(i); 29 C.F.R. § 2520.101-3.

⁴⁹ 29 C.F.R. § 2520.101-3(d)(1).

⁵⁰ ERISA § 101(i), 29 U.S.C. § 1021(i).

⁵¹ 29 C.F.R. § 2520.101-3(e).

⁵² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 306(a)(1)

inform them of their inability to trade stock during the blackout period.

Notice of Qualified Default Investment Alternative (QDIA Notice)

A qualified default investment alternative (QDIA) is a defined contribution plan feature that defines how contributions are invested in the event that a participant does not specify how they should be invested.⁵³ The purpose of the QDIA Notice is to notify participants of how their contributions will be invested absent an affirmative investment election. The regulatory requirements that accompany the offering of a QDIA specify the permissible types of investment options.⁵⁴ The QDIA Notice must specify the default investment alternatives available under the plan and the ways a participant may change investments. The QDIA Notice must be provided at least 30 days before the beginning of the plan year or before the initial investment into the QDIA, as applicable.⁵⁵

Notice of Employer Stock Diversification Rights

This notice describes the participant's right to diversify his or her investment in employer stock into other investment vehicles.⁵⁶ The notifier must provide this notice to participants no later than 30 days before the individual is first eligible to diversify his or her investment in employer stock.⁵⁷ Certain 401(k) plans that contain non-publicly traded securities must provide a different notice that is only applicable to participants who have satisfied specific age and service requirements.⁵⁸

Notice of Automatic Contribution Arrangement

This notice describes certain participant's rights under a plan that offers an automatic contribution arrangement provision under the plan, which is commonly referred to as the preemption notice.⁵⁹ It is important to note that although this notice is different from the safe harbor notice discussed above,⁶⁰ the rules related to providing this notice are closely linked to the QDIA Notice.⁶¹ More specifically, in most cases the issuance of a QDIA Notice satisfies the issuance of the automatic

contribution arrangement notice.⁶² The notifier, in this case the plan administrator, must provide the automatic contribution arrangement notice to each participant or beneficiary at least 30 days before the beginning of the plan year.⁶³

Qualified Domestic Relations Order Notices

Two notices are provided in connection with the provision of a qualified domestic relations order. The first notice is issued after a domestic relations order is submitted for review and consideration. Shortly after receiving the domestic relations order, the notifier, in this case the plan administrator, must send a notice to the participant and any alternative payees.⁶⁴ The notice verifies receipt of the domestic relations order. The second notice is issued after the plan administrator determines whether the domestic relations order is qualified.⁶⁵ The plan administrator has a reasonable period of time following receipt of the domestic relations order to determine whether it is qualified and then to issue the notice. Just like the first notice, the plan administrator must provide the second notice to participants and alternative payees.

Other Notices

In addition to the defined contribution plan notices discussed above, a number of other notices and forms are provided to plan participants. These notices are commonly required due to the occurrence of an event, *i.e.* an event triggers the requirement to provide a notice. These notices and forms include: beneficiary designation forms, elective deferral forms, claims forms, hardship distribution forms, plan loan applications, mandatory distribution notices, rollover notices, special tax notices and ERISA § 404(c) disclosure notices. Many of these notices are essential to the operation of a defined contribution plan and effectuate the administration of the terms of the legal plan document.

Consistently communicating the correct terms of the plan document is essential. Care should be used to ensure that the terms of these notices and forms do not conflict with the terms of the legal plan document. Even though most legal plan documents contain a provision that affords deference to the terms of a plan document, the improper administration of a plan can create IRS qualification issues as a result of not operating a plan in accordance with its terms.⁶⁶

Errors and Correction Procedures

The notifier is usually assessed a penalty for failing to provide a notice. With the large number of notice requirements, this can become an issue for the notifier. The applicable penalty depends on the type of notice and the governmental organization that oversees the

(2002); 17 C.F.R. § 245.101.

⁵³ ERISA § 404(c)(5), 29 U.S.C. § 1104(c)(5).

⁵⁴ 29 C.F.R. § 2550.404c-5. The DOL issued proposed regulations that require new content requirements for the QDIA Notice, including the investment goals and strategies. 75 Fed. Reg. 73987 (November 30, 2010).

⁵⁵ 29 C.F.R. § 2550.404c-5(c)(3)(i)(A).

⁵⁶ ERISA § 101(m), 29 U.S.C. § 1021(m).

⁵⁷ *Id.*

⁵⁸ Internal Revenue Code § 401(a)(28).

⁵⁹ ERISA § 514(e)(3), 29 U.S.C. § 1144(e)(3). The term automatic contribution arrangement is defined in ERISA § 514(e)(2).

⁶⁰ The preamble of the proposed rule stated that if the notifier uses the safe harbor rules and elects the Qualified Automatic Contribution Arrangement, this notice requirement is satisfied through the safe harbor notice. 72 Fed. Reg. 63,144, 63,147 (11/8/2007). This statement, however, was not included in the final regulations. See 74 Fed. Reg. 3200 (2/24/2010).

⁶¹ 29 C.F.R. § 2550.404c-5.

⁶² 29 C.F.R. § 2550.404c-5(f).

⁶³ 29 C.F.R. § 2550.404c-5(e)(3).

⁶⁴ ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).

⁶⁵ *Id.*

⁶⁶ Rev. Proc. 2008-50, § 5.01(2)(b).

regulation of the particular notice. The following chart summarizes the penalties.

Name of Notice	Penalty for Failure to Provide
Summary Plan Description	Participant may bring an action to enforce the SPD requirement; ¹ criminal penalties if willful; ² \$110 per day for a failure to furnish upon request. ³
Summary of Material Modifications	Participant may bring an action to enforce the SMM requirement; ⁴ criminal penalties if willful; ⁵ \$110 per day for a failure to furnish upon request. ⁶
Summary Annual Report	Criminal penalties if willful. ⁷
Special Enrollment Notice	\$100 per day to participant (if requested by participant to be provided); penalty may increase if issue brought to the court system.
Certificate of Creditable Coverage	\$100 per day to participant (if requested by participant to be provided); penalty may increase if issue brought to the court system.
Initial COBRA Notice	\$100 per day to participant (if requested by participant to be provided); penalty may increase if issue brought to the court system. ⁸
COBRA Election Notice	\$100 per day to participant (if requested by participant to be provided); penalty may increase if issue brought to the court system. ⁹
General Notice of Pre-Existing Condition Exclusion	\$100 per day to participant (if requested by participant to be provided); penalty may increase if issue brought to the court system.
Individual Notice of Period of Pre-Existing Condition Exclusion	\$100 per day to participant (if requested by participant to be provided); penalty may increase if issue brought to the court system.
WHCRA Notice	No specific penalties.
QMCSO Notice	No specific penalties.
Individual Benefit Statements	Up to \$100 per day to participant or beneficiary and a court may order other relief if deemed proper; penalty may increase if issue brought to the court system. ¹⁰
Safe Harbor § 401(k) Notice	Operational failure (disqualification of plan). ¹¹
Notice of Investment Blackout Period	\$100 per day to participant. ¹²
Notice of Qualified Default Investment Alternative	No specific penalties; fiduciary liability to the employer for choice of QDIA. ¹³
Notice of Employer Stock Diversification Rights	Up to \$100 per day to participants or beneficiaries. ¹⁴
Notice of Automatic Contribution Arrangement	Up to \$1,000 per day for each violation. ¹⁵

¹ ERISA § 502(a), 29 U.S.C. § 1132(a).

² ERISA § 501, 29 U.S.C. § 1131.

³ ERISA § 502(c)(6), 29 U.S.C. § 1132(c)(6).

⁴ ERISA § 502(a), 29 U.S.C. § 1132(a).

⁵ ERISA § 501, 29 U.S.C. § 1131.

⁶ ERISA § 502(c)(6), 29 U.S.C. § 1132(c)(6).

⁷ *Id.*

⁸ ERISA § 502(c), 29 U.S.C. § 1132(c).

⁹ *Id.*

¹⁰ ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1).

¹¹ The IRS has requested comments on the method for correcting the failure to provide a Safe Harbor 401(k) Notice. Rev. Proc. 2008-50, § 2.02(2).

¹² ERISA § 502(c)(7), 29 U.S.C. § 1132(c)(7).

¹³ 29 C.F.R. § 2550.404c-5.

¹⁴ ERISA § 502(c)(7), 29 U.S.C. § 1132(c)(7).

¹⁵ ERISA § 502(c)(4), 29 U.S.C. § 1132(c)(4).

A notifier who fails to comply with a notice requirement may encounter different agencies and courts, de-

pending on the applicable notice, in determining the assessed penalty. In general, a court may only enforce a

penalty if an action is brought by a participant against the notifier.⁶⁷ In addition, the DOL may enforce a penalty against the notifier. If the IRS is the government entity that oversees the specific notice, the IRS has provided a correction program that the notifier may utilize to correct the error.⁶⁸ The IRS has stated that the failure to provide a safe harbor notice may be corrected using the Voluntary Correction Program.⁶⁹ However, Rev. Proc. 2008-50, which governs the correction program, does not provide the process that a notifier must complete to remedy the failure to provide the notice.⁷⁰

Issues Affecting Participant Notices

Since 2005, the DOL has convened several working groups to examine issues affecting the participant disclosures. The DOL working groups were composed of experts in the field of employee benefits, and their reports were based on the testimony of experts. The DOL working groups reviewed a myriad of issues, including the content of disclosures and the electronic distribution of disclosures, in preparing reports with short- and long-term recommendations on how to improve participant disclosures. The DOL working groups reports provide useful insight into the issues currently confronting benefit plan administration, and potential policy changes on how to mitigate the effects of certain issues and eliminate others. The remainder of this section summarizes key points identified by the DOL working groups and suggests methods for responding to these issues.

The DOL working groups have reviewed various issues with the current participant disclosure rules.⁷¹ Three of these issues are of particular interest: (1) the effectiveness of the SPD; (2) the effect of compliance expenses on the administration of benefit plans; and (3) the increase of electronic disclosures.

First, the DOL working group concluded that the SPD does not fulfill its purpose of communicating essential plan terms to participants.⁷² The SPD is often

cited as being too complex and not user-friendly for the average participant. As a consequence, most participants do not read the SPD cover to cover. In fact, most plan participants are “confused, misinformed, or uninformed after looking at an SPD.” Even the DOL has admitted that the SPD is a very complex document.⁷³

Court decisions are a major reason for the increasing complexity of SPDs. Over the past few decades, courts have placed an emphasis on the SPD as a legally binding document that may supersede the terms in the actual plan document.⁷⁴ Ten of the 11 federal circuit courts have determined that if there is a conflict between the terms of the SPD and the plan document, the terms of the SPD may prevail.⁷⁵ In response, retirement plan sponsors have drafted SPDs using technical language instead of language that is understandable by the average participant.⁷⁶ Technical language is used to mitigate the risk of a court interpreting an SPD as providing a benefit that was not intended to be provided under the plan document.⁷⁷

Technical language, however, is not the only method notifiers may employ to mitigate the risks of an adverse interpretation of plan terms by a court. Notifiers should make sure that the plan document and the SPD state that the terms of the plan document control over the SPD and other documents. In addition, notifiers should

Retirement Plan Participants, U.S. Dept. of Labor, Nov. 2005, available at http://www.dol.gov/ebsa/publications/AC_1105b_report.html.

⁷³ In the final regulations issued regarding qualified default investment alternatives (QDIAs), the DOL stated that it would not be helpful to provide QDIA notices in a SPD or SMM, “given the potential length and complexity of summary plan descriptions and summaries of material modifications. . . .” *Default Investment Alternatives Under Participant Directed Individual Account Plans*, 72 Fed. Reg. 60,452, 60,454 (10/24/07).

⁷⁴ See *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 30 EBC 2121 (3d Cir. 2003).

⁷⁵ See *Heidgerd v. Olin Corp.*, 906 F.2d 903, 12 EBC 2015 (2d Cir. 1990); *Burstein v. Ret. Acct. Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 30 EBC 2121 (3d Cir. 2003); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 15 EBC 1873 (4th Cir. 1992); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 14 EBC 1909 (5th Cir. 1991); *Edwards v. State Farm Mutual Ins. Co.*, 851 F.2d 134 (6th Cir. 1988); *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 14 EBC 2317 (7th Cir. 1991); *Barker v. Ceridian Corp.*, 122 F.3d 628, 21 EBC 2456 (8th Cir. 1997); *Atwood v. Newman & Gold Co.*, 45 F.3d 1317, 28 EBC 1328 (9th Cir. 1995); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 22 EBC 1403 (10th Cir. 1996); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 6 EBC 1707 (11th Cir. 1985).

⁷⁶ This practice conflicts with ERISA’s intent to provide participants with user-friendly SPDs and other notices. For example, one expert testifying before the DOL referenced a 47-page checklist that one consulting firm utilizes to prepare a SPD for a health plan. *Report of the Working Group on Health and Welfare Benefit Plans’ Communications*, U.S. Dept. of Labor, Nov. 2005, available at http://www.dol.gov/ebsa/publications/AC_1105c_report.html.

⁷⁷ *Id.*; *Report of the Working Group on Communications to Retirement Plan Participants*, U.S. Dept. of Labor, Nov. 2005, available at http://www.dol.gov/ebsa/publications/AC_1105b_report.html.

⁶⁷ ERISA § 502(c), 29 U.S.C. § 1132(c).

⁶⁸ See Rev. Proc. 2008-50; *The Fix Is In: Common Plan Mistakes - Failure to Provide a Safe Harbor 401(k) Plan Notice*, <http://www.irs.gov/retirement/article/0,,id=200386,00.html> (last reviewed or updated October 13, 2010).

⁶⁹ *The Fix Is In: Common Plan Mistakes - Failure to Provide a Safe Harbor 401(k) Plan Notice*, <http://www.irs.gov/retirement/article/0,,id=200386,00.html>.

⁷⁰ Rev. Proc. 2008-50.

⁷¹ *Report of the Working Group on Health and Welfare Benefit Plans’ Communications*, U.S. Dept. of Labor, Nov. 2005, available at http://www.dol.gov/ebsa/publications/AC_1105c_report.html; *Report of the Working Group on Communications to Retirement Plan Participants*, U.S. Dept. of Labor, Nov. 2005, available at http://www.dol.gov/ebsa/publications/AC_1105b_report.html; *Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries*, U.S. Dept. of Labor, 2009, available at <http://www.dol.gov/ebsa/publications/2009ACreport2.html>.

⁷² *Report of the Working Group on Communications to Re-*

review the terms of the SPD to make sure that its terms do not provide a different benefit than the plan document.

Second, the administrative expense of providing participant disclosures can decrease the amount of participant savings under a defined contribution plan.⁷⁸ The cause of this issue is that certain administrative costs may be paid by deducting amounts from participant accounts. The increase in the number of notices required to be distributed, in addition to more complex regulatory laws, could increase the amount of funds that are withdrawn from participant accounts each year. For example, if an employee is 45 years of age and has \$20,000 in his account, and the average net return is 7 percent with a 0.5 percent charge for fees, the \$20,000 will increase to about \$70,500 (assuming retirement is at age 65).⁷⁹ However, if the fees and expenses increased by a 1.5 percent charge (due to the increased cost of administering the plan), the \$20,000 will increase to only \$58,400 at retirement.⁸⁰ A recent report by the American Society of Pension Professionals & Actuaries (ASPPA) stated that participants in small plans could incur charges of up to 2.5 percent of the annual amount deferred solely for disclosures (not including other administrative costs).⁸¹ A plan participant with a larger account balance would notice a larger impact on his or her account balance if there is an increase in the cost of administration of the employee benefit plan and such cost is passed through to the participant as a percentage of plan assets. Regardless of the number of plan participants, notifiers should use care in reviewing the reasonableness of expenses incurred in connection with plan administration, especially where a third party is responsible for plan administration.

Third, the DOL working group report suggested that the DOL and IRS streamline the disclosure system by reformulating the electronic disclosure regulations.⁸² In the future, the DOL may consider taking advantage of the benefits of electronically distributing information to participants. Right now notifiers may consider taking the first steps toward integrating electronic filing into plan administration. Thus, the current IRS and DOL

regulations can be used to simplify the administration of the required notices.⁸³

Conclusion

At the current pace of new mandatory participant notices that are to be provided to participants of employee benefit plans, the number of pages necessary to provide such notices to one participant may soon exceed the total number of pages of a typical plan document. The DOL has heard testimony on the need to ensure that participant notices focus more on user-friendly formats and less on legalese. The DOL is fully aware of the confusion experienced by participants of qualified employee benefit plans. However, there is no indication that the participant notices overseen by the DOL will be revised or become more user-friendly in the near future. In fact, it seems that the number of participant notices will only increase.

ASPPA has recommended that Congress review the need for one standard document that could be used as a “single source” of information regarding the plan.⁸⁴ This single document (“Plan Operating Manual”) would be written in a manner that the average participant could understand and would not contain legalese. If the notifier must provide a required notice to a participant, the notice would simply reference a specific section of the Plan Operating Manual.

To remedy the information overload, the one effective use of current disclosure rules should be to decrease the amount of information automatically provided to participants without sacrificing the basic information that the participant needs to make an informed decision. This could be accomplished by providing participants with a notice that only contains the most basic information regarding the topic of the required notice. With respect to some notices, the information could be shortened to a few sentences, as compared to the several paragraphs or even pages of current notices. The end of the notice could state that if the participant desires more information regarding the topic of the specific notice, the participant has 30 days to contact the employer to receive further details. This would decrease the amount of unnecessary information that every participant automatically receives while participating in an employee benefit plan. It would also reduce participants’ likelihood of being overwhelmed as they are under the current disclosure process. Admittedly, this does not significantly decrease the cost to the employer or participant for providing such notices. One viable option for decreasing the cost of providing notices is for certain notices to be combined.

⁷⁸ *Report of the Working Group on Participant Benefit Statements*, U.S. Dept. of Labor, 2007, available at <http://www.dol.gov/ebsa/publications/AC-1107c.html>.

⁷⁹ Testimony before the Committee on Education and Labor, U.S. House of Representatives, *Increased Reliance on 401(k) Plans Calls for Better Information on Fees*, Statement of Barbara D. Bovbjerg, U.S. Government Accountability Office, Mar. 6, 2007, available at <http://www.gao.gov/new.items/d07530t.pdf>.

⁸⁰ *Id.*

⁸¹ Statement by Sal Tripodi, Comments Presented to the Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, U.S. House of Representatives, May 3, 2007, available at <http://edlabor.house.gov/testimony/050307SalTripoditestimony.pdf>.

⁸² *Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries*, U.S. Dept. of Labor, 2009, available at <http://www.dol.gov/ebsa/publications/2009ACreport2.html>.

⁸³ *Id.*

⁸⁴ Statement by Sal Tripodi, Comments Presented to the Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, U.S. House of Representatives, May 3, 2007, available at <http://edlabor.house.gov/testimony/050307SalTripoditestimony.pdf>.

With Congress focused on full disclosure of facts that affect participant decisions, the DOL and the IRS should reevaluate the entire disclosure process. The agencies must determine how to enable notifiers to provide the required notices and educate participants about their benefits and rights without overwhelming them

with information or increasing the costs of providing such information. If action is not taken soon, the purpose behind disclosure to participants of employee benefit plans may be lost.

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