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*Employee Benefits Update* — *March 27, 2024*

# Retirement Plans: Grab Bag Guidance for SECURE 2.0

## EXECUTIVE SUMMARY

The IRS and DOL have issued guidance on a variety of the wide-ranging changes under the SECURE 2.0 Act, including:

- Proposed IRS regulations involving the requirement that long-term part-time employees be permitted to make deferrals into a 401(k) plan;
- IRS Notice 2024-02 on implementation requirements, including plan amendment deadlines and certain optional changes;
- DOL FAQs and IRS Notice 2024-22 on pension linked emergency savings accounts; and
- DOL proposed regulations on automatic portability of retirement savings.

### IMPORTANT DATES

April 1:

- Confirm Forms 1099-R filed with IRS (if filing electronically)
- Initial required minimum distributions (RMDs) due to participants who terminated employment after reaching their RMD age in 2023
- File Form 5330 to report and pay excise taxes for excess 2022 ADP/ACP contributions not timely corrected in 2023

April 15

- Fund contributions to defined benefit pension plans for 2024 Q1
- Distribute excess 2023 402(g) deferrals under 401(k)/403(b) plans

April 29:

- Distribute Annual Funding Notice (defined benefit pension plans with 100+ participants)

### *Long-Term Part-Time Employees*

The IRS issued proposed regulations under SECURE 1.0 and SECURE 2.0 in November 2023 that apply to long-term, part-time employee ages 21 and older ("LTPT Employees").

For the 2024 plan year, the rules under SECURE 1.0 require LTPT Employees who have 3 consecutive 12-month periods with at least 500 hours of service to be eligible to make deferrals under a 401(k) plan.

For the 2025 plan year, SECURE 2.0 shortens the wait for LTPT Employees, so that employees who have 2 consecutive 12-month periods with at least 500 hours of service must be eligible to make deferrals under 401(k) and 403(b) plans.

The proposed regulations include a significant level of detail, including definitions and clarifying that periods of service prior to 2021 are excluded for purposes of LTPT Employees' eligibility and vesting. The proposed regulations are also explicit that LTPT Employees do not include individuals who do not meet plan eligibility for

reasons other than age and service (e.g., if excluded based on job classification or work location), but do not provide detailed guidance on what job-based exclusions are permitted or prohibited.

- ✓ ***Action Steps for Employers:*** Plan sponsors should review their 401(k) and 403(b) plans for any employee exclusions to ensure there is no conflict with the LTPT Employee requirements, to determine whether to exclude LTPT Employees from nondiscrimination and coverage testing, and to determine whether a plan amendment may be necessary or desirable.
  - In some cases, an eligibility exclusion may be outdated (e.g., the plan contains an exclusion for interns, but no interns have been employed and it is not anticipated that any will be hired), in which case a plan amendment removing such exclusion can avoid potential compliance concerns and simplify administration.
  - In other cases, the exclusion may be in conflict with the LTPT Employee requirements (e.g., a plan exclusion for part-time employees), in which case a plan amendment may be required to address the conflict and/or administrative steps may be necessary to ensure appropriate tracking of this subset of LTPT Employees with respect to employee deferrals.
  - If the LTPT Employee rules apply, keep in mind that a plan sponsor can always choose to implement a more generous plan design (e.g., immediate eligibility, full participation in the 401(k) plan), taking into account the costs and administrative considerations (e.g., burden of tracking a subset of employees, nondiscrimination testing).

## *IRS Notice 2024-02: FAQ Guidance on SECURE 2.0 Implementation*

On December 20, 2023, the IRS issued Notice 2024-02, which provides additional guidance on the implementation of various changes under SECURE 2.0. Notice 2024-02, styled as frequently asked questions, is a "grab bag" of guidance on implementing both **required** and **optional** changes under SECURE 2.0.

**Required Changes**: Notice 2024-02 extends the deadline for both required and discretionary amendments under SECURE 2.0 to December 31, 2026, with nuances for collectively bargained plans and governmental plans. Notice 2024-02 also provides additional detail on the requirement that 401(k) and 403(b) plans established after December 29, 2022 must have an automatic enrollment feature, including addressing how this requirement applies to a plan spinoff or merger.

**Optional Changes:** Notice 2024-02 addresses implementation on a variety of optional changes under SECURE 2.0, including:

- Financial incentives to enroll in a 401(k) or 403(b) plan (up to $250, which can be made in installments);
- Distributions for terminal illness, which are not subject to the 10% early distribution penalty; and
- Participant elections to treat employer contributions as Roth after-tax contributions.

Given the many outstanding SECURE 2.0 implementation questions, Notice 2024-02 is welcome news—especially to third-party administrators and recordkeepers as they consider how to program and build out their systems for SECURE 2.0 changes.

- ✓ ***Action Steps for Employers:*** Implementation of any optional SECURE 2.0 change requires the plan sponsor to both assess the desirability of the change and the feasibility of implementation by the plan's recordkeeper, administrator, and custodian. As a result, plan sponsors should regularly revisit the feasibility and timing of implementing SECURE 2.0 changes with the plan's service providers. In light of the extended amendment deadline, plan sponsors who intend to wait to amend their plan should ensure a clear record of what changes are adopted operationally in order to avoid an inadvertent failure to formally adopt the change.

## *Pension Linked Emergency Savings Accounts*

The DOL and IRS have both issued initial guidance on pension linked emergency savings accounts ("PLESAs"). Created under SECURE 2.0, PLESAs are short term savings accounts maintained within a defined contribution plan (such as a 401(k) or 403(b) plan) that allow employees the ability to accrue savings up to a maximum of $2,500 (as indexed) and make monthly account withdrawals.

The DOL issued a series of twenty FAQs covering a variety of PLESA topics such as:

- <u>Eligibility and participation</u> – Employers can choose to offer PLESAs maintained within their defined contribution plan and may also decide to automatically enroll participants into the PLESA program. Eligible PLESA participants do not have to participate in the employer-sponsored defined contribution plan to have a PLESA, and there cannot be a minimum balance requirement.
- <u>Contributions</u> – Employers that offer matching contributions for non-PLESA contributions must offer the same matching rate for PLESA contributions, with the matching contribution to be allocated to the participant's retirement (non-PLESA) account. There are additional rules regarding contribution limits, including that a plan sponsor can require PLESA contributions to be whole dollar amounts.
- <u>Distributions and withdrawals</u> – Participants can withdraw PLESA funds at least once a month, not subject to pre-approval demonstrating an emergency, and there are no explicit restrictions on distribution options.
- <u>Administration and investment</u> – There are additional rules regarding notices, reporting, fund disclosures, accounting, allowable fees, and recordkeeping.

IRS Notice 2024-22, in contrast to the DOL guidance, focuses specifically on anti-abuse rules relating to employer matching contributions on PLESA contributions. Notice 2024-22 explicitly details reasonable anti-abuse procedures employers can implement to discourage manipulation of matching contribution rules, such as establishing reasonable procedures to limit the frequency or amount of matching contributions.

- ✓ ***Action Steps for Employers:*** The initial guidance is a welcome development, especially as many third party administrators have indicated a reluctance to even begin any systems updates to provide for PLESAs without further guidance from the government. While this guidance is initial and does not address all implementation issues, plan sponsors interested in implementing a PLSEA should coordinate with their third-party administrator, recordkeeper and custodian to discuss feasibility and timing of adopting this discretionary feature based on this additional guidance.

## *Automatic Portability*

The DOL issued a proposed rule providing a prohibited transaction exemption in connection with automatic portability transactions, which are meant to aid workers in keeping track of their retirement savings by reducing cash-outs when changing jobs. An automatic portability transaction occurs when an employee's retirement savings (that is subject to the plan's cash-out provisions) is automatically transferred from a previous employer's retirement plan to a Safe Harbor IRA and then into the employee's active account in a retirement plan sponsored by the employee's new employer.

The proposed rule would create a prohibited transaction exemption for automatic portability providers receiving fees or compensation when facilitating an automatic portability transaction into Safe Harbor IRAs. The proposed rule details the requirements that automatic portability providers must satisfy to qualify for the exemption, including disclosing and setting reasonable fees, acknowledging their fiduciary status, not accepting fees for transferring into or a plan that is a plan of the provider or one of its affiliates, and protecting data and restricting its use.

- ✓ ***Action Steps for Employers:*** While automatic portability providers will handle the transfer of the employee's retirement savings, plan sponsors should be aware of the prohibited transaction exemption requirements when selecting an automatic portability provider and the impact of this feature on their retirement plans, including the potential need to provide education for new hires and employees who terminate their employment.

## *Additional Information*

Keep an eye out for a forthcoming invitation to our Benefits Seminar on May 1!

For additional information about these new retirement plan developments, or any other employee benefits matter, please contact any member of our Employee Benefits and Executive Compensation Group listed below.

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## SECURE 2.0: A Planning and Implementation Checklist

## Qualified Retirement Plan Operations and Administration - Mandatory Changes

| Issue | Mandatory Change | Effective Date | Considerations | Decision |
|---|---|---|---|---|
| Tracking hours for long-term part-time workers | 401(k) and 403(b) plans must allow part-time workers who have completed 500 hours of service in 2 consecutive years to be able to participate in the plan, for purposes of deferral contributions only. Pre-2023 service is not counted. | Participation must be available for plan years beginning after 12/31/2024 | ✓ Begin tracking hours for long-term part-time workers in 2023 and 2024 (which may have already been started under SECURE 1.0 for 401(k) plans)<br>✓ Determine whether, once eligible, these individuals will also qualify for matching and other employer contributions | |
| Roth-only catch-up contributions for certain highly compensated employees (HCEs) | 401(k), 403(b) and governmental 457(b) plans must accept catch-up contributions only on a Roth basis from participants whose prior year compensation exceeds $145,000 (indexed).<br><br>It is not clear (until we receive agency guidance) whether an employer can require that all catch-up contributions be made on a Roth basis, regardless of compensation level. | Plan years beginning after 12/31/2025 (due to recently-issued IRS administrative transitional period) | ✓ Identify HCEs subject to this change and develop communication<br>✓ If plan does not have Roth option, it must be added<br>✓ Coordinate with recordkeeper and payroll – possibility to have all catch-up be Roth | |
| Required minimum distributions (RMDs) | For participants who turn 72 after 12/31/2022, the RMD age is increased to age 73. (For participants who turn 74 after 12/31/2032, the RMD age will increase to 75.) | For distributions made after 12/31/2022 | ✓ Coordinate with recordkeeper and its RMD service | |

| Issue | Mandatory Change | Effective Date | Considerations | Decision |
|---|---|---|---|---|
| | RMDs, before death, do not apply to Roth accounts | Plan years beginning after 12/31/2023 | ✓ Coordinate with recordkeeper and its RMD service | |
| | A surviving spouse can elect to be treated as the deceased employee for purposes of RMDs | 1/1/2024 | ✓ Coordinate with recordkeeper and its RMD service | |
| Qualified birth or adoption distributions (QBOADs) | Did the plan permit QBOADs under SECURE 1.0?<br>If so, you must inform recipients that they have 3 years to repay distributions, and for QBOADs received before 12/29/22, the repayment deadline (previously unlimited) is now 12/31/2025. | | ✓ Coordinate with recordkeeper to identify participants who received QBOADs and develop communication | |
| Top-heavy testing | The plan is permitted (but not required) to perform top-heavy testing separately for excludable employees (those who have not met the minimum age and service requirements for participation) and non-excludable employees | Plan years beginning after 12/31/2023 | ✓ Coordinate with recordkeeper and its testing service to determine if this would be helpful | |
| Retirement Savings Lost & Found | Furnish information about current and former participants to the DOL for its new searchable database about retirement benefits. | Plan years beginning after 12/31/2023; database must be established by 12/29/2024 | ✓ Await agency guidance about what information will have to be reported, form/manner of reporting, and procedures for participant opt-out<br>✓ Coordinate with recordkeeper | |
| Annual Funding Notices (AFNs) for defined benefit plans | AFNs for defined benefit plans must include new additional information on the plan's funding and participants. | Plan years beginning after 12/31/2023 | ✓ Await agency guidance (new model form)?<br>Coordinate with recordkeeper | |

| Issue | Mandatory Change | Effective Date | Considerations | Decision |
| --- | --- | --- | --- | --- |
| Mortality tables | The mortality tables for defined benefit plans cannot assume future rates of improvement greater than 0.78% at any age | Valuation dates on or after 1/1/2024 | ✓ Coordinate with recordkeeper | |

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## Qualified Retirement Plan Design - Optional Changes

| Issue | Optional Changes | Considerations | Decision |
|---|---|---|---|
| "Rothification" of employer contribution sources | ✓ Do you want to allow participants to elect to receive employer match and/or nonelective contributions in your 401(k), 403(b) or governmental 457(b) plan on a Roth basis?<br>✓ If so, when will this be effective? It is permitted for contributions made after 12/29/2022. | ✓ IRS Notice 2024-2 provides additional implementation guidance<br>✓ No cost impact to employer<br>✓ Could provide employees with opportunity for significant tax savings over the long-term<br>✓ Requires substantial education to employees and recordkeeping adjustments with recordkeeper | |
| Small financial incentives | ✓ Do you want to offer *de minimis* financial incentives (not paid from plan assets) for participation in your 401(k) or 403(b) plan?<br>✓ If so, what will the financial incentive be?<br>✓ If so, when will this be effective? It is permitted for plan years beginning after 12/29/2022. | ✓ IRS Notice 2024-2 defines *de minimis* – up to $250<br>✓ Evaluate your plan participation rate to determine if an incentive is necessary<br>✓ Cost impact to employer – and evaluate additional costs of incentive – for instance, a low dollar gift card plus associated payroll tax costs, since gift cards are taxable wage income to the employee | |
| Matching student loan repayments | ✓ Do you want your 401(k), 403(b), governmental 457(b) or SIMPLE plan to consider "qualifying student loan payments" as elective deferrals under the plan for purposes of matching contributions?<br>✓ If so, when will this be effective? It is permitted for plan years beginning after 12/31/2023. | ✓ Await agency guidance (model amendment)<br>✓ Cost impact to employer (additional matching expense)<br>✓ Certification process for qualifying student loan payments<br>✓ Coordinate with recordkeeper | |

| Issue | Optional Changes | Considerations | Decision |
|---|---|---|---|
| Emergency savings accounts | ✓ Do you want to permit non-highly compensated employees to contribute to an emergency savings account linked to their retirement plan, subject to numerous conditions? These after-tax contributions are eligible for match.<br>✓ If so, what will the limit be (max is $2,500)?<br>✓ If so, when will this be effective? It is permitted for plan years beginning after 12/31/2023. | ✓ IRS Notice 2024-22 and DOL FAQs provide additional guidance<br>✓ Consider additional cost impact to employer due to matching expense vs. potential savings from recordkeeping, administrative and investment fees due to additional plan assets<br>✓ Coordinate with recordkeeper, as this will require separate accounting due to different distribution rights | |
| Increase in catch-up contribution limit for participants 60-63 | ✓ Do you want to permit participants aged 60-63 to make increased catch-up contributions (greater of $10K or 150% of the regular catch-up limit as indexed annually)?<br>✓ If so, when will this be effective? It is permitted for tax years beginning after 12/31/2024. | ✓ Consider cost impact<br>✓ Coordinate with recordkeeper, as this right will only be available to a subset of catch-up eligible participants whose ages would need to be tracked | |
| Permit partial annuity payments to offset RMDs | ✓ Do you want to permit participants to partially annuitize benefits, so that annuity payouts offset RMDs required from the non-annuity portion of the participant's account?<br>✓ If so, when will this be implemented? It is permitted for years after 12/29/22. | ✓ Plan terms would need to be modified to permit annuities; however, this significantly complicates plan administration (e.g., spousal consent), and constrains further design changes to optional payment forms available under the plan | |

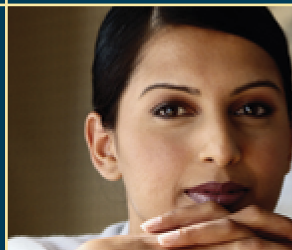
| Issue | Optional Changes | Considerations | Decision |
|---|---|---|---|
| Hardship distribution certifications | ✓ Do you want to permit self-certification by a participant for certain hardship distribution requirements?<br>✓ If so, when will this be implemented? It is permitted for plan years after 12/29/2022. | ✓ No cost to employer<br>✓ Simplifies plan administration<br>✓ Requires coordination with recordkeeper - what will self-certification consist of, and how will records be maintained?<br>✓ Await agency guidance, which may limit the scope of self-certification | |
| Penalty-free withdrawal for emergency expenses | ✓ Do you want to permit distributions to participants under 59-1/2, without the 10% early withdrawal penalty, for distributions up to $1,000 that meet certain requirements? (May rely on the participant's self-certification of eligibility.)<br>✓ If so, when will this become effective? It is permitted for distributions after 12/31/2023. | ✓ No cost impact to employer<br>✓ May reduce leakage through loans<br>✓ Consider as part of overall financial wellness program<br>✓ Coordinate with recordkeeper – what will self-certification consist of, and how will records be maintained<br>✓ Await agency guidance which may limit the scope of self-certification | |

| Issue | Optional Changes | Considerations | Decision |
|---|---|---|---|
| Penalty-free distributions or qualified federally declared disasters | ✓ Do you want to permit distributions for qualified federal declared disasters, of up to $22K per disaster, provided that they are made within 180 days after the later of the first day of the incident period or date of disaster declaration? These can be repaid within 3 years of distribution, or taxation can be spread over 3 years.<br>✓ If so, what kind of documentation or certification will you require – these distributions can be provided to participants whose "principal place of abode" is in a disaster area at any time during the incident period and who have sustained an economic loss because of the qualified disaster.<br>✓ If so, when will this be implemented? It is available for disasters with incident periods that began on or after 1/26/2021 | ✓ No cost to employer<br>✓ Requires coordination with recordkeeper, especially with respect to (i) certification, (ii) repayment, and (iii) taxation options. | |

| Issue | Optional Changes | Considerations | Decision |
|---|---|---|---|
| Penalty-free withdrawal for terminal illness | ✓ Do you want to permit distributions to participants under 59-1/2, without the 10% early withdrawal penalty, who have a condition certified by a physician to reasonably be expected to result in death within 84 months after the certification?<br>✓ If so, when will this become effective? It is permitted for distributions after 12/29/2022. | ✓ No cost impact to employer<br>✓ Coordinate with recordkeeper regarding certification requirements<br>✓ IRS Notice 2024-2 provides guidance on certification requirements (currently, self-certification not permitted) | |
| Penalty-free withdrawal for domestic abuse victims | ✓ Do you want to permit distributions to participants under 59-1/2, without the 10% early withdrawal penalty, for distributions to domestic abuse victims, subject to certain conditions?<br>✓ If so, when will this become effective? It is permitted for distributions after 12/31/2023. | ✓ No cost impact to employer<br>✓ Coordinate with recordkeeper | |
| Penalty-free distributions to pay LTC premiums | ✓ Do you want to permit penalty-free distributions to participants so that they can pay their long-term care insurance premiums, limited to the<br>✓ lesser of 10% of vested account or $2,500?<br>✓ If so, when will this become effective? It is permitted for distributions after 12/29/2025. | ✓ No cost impact to employer<br>✓ Promotes retirement plan leakage<br>✓ Coordinate with recordkeeper | |

| | | | |
|---|---|---|---|
| Increase in cash-out limit | ✓ Do you want to increase the limit for mandatory cash-outs under your plan from $5,000 to $7,000?<br>✓ If so, when will this become effective? It is permitted for distributions after 12/31/2023. | ✓ No cost impact to employer<br>✓ May slightly reduce the number of former participants with an account balance<br>✓ May reduce any asset-based fees for the plan<br>✓ Coordinate with recordkeeper | |
| Simplified reporting for eligible but nonparticipating employees | ✓ Do you want to implement simplified reporting for eligible but nonparticipating employees in the plan (rather than these employees receiving the same communications as active participants)?<br>✓ If so, when will this be implemented? It is permitted for plan years beginning after 12/31/2022. | ✓ Requires coordination with recordkeeper to identify eligible nonparticipating employees into a different subgroup<br>✓ Await guidance as to what simplified reporting would be required<br>✓ May have cost implications and higher administrative burden for employer to develop different communication packages | |

# Meeting Your Fiduciary Responsibilities



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This booklet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

# Meeting Your Fiduciary Responsibilities

Offering a retirement plan can be one of the most challenging, yet rewarding, decisions an employer can make. The employees participating in the plan, their beneficiaries, and the employer benefit when a retirement plan is in place. Administering a plan and managing its assets, however, require certain actions and involve specific responsibilities.

To meet their responsibilities as plan sponsors, employers need to understand some basic rules, specifically the Employee Retirement Income Security Act (ERISA). ERISA sets standards of conduct for those who manage an employee benefit plan and its assets (called fiduciaries). *Meeting Your Fiduciary Responsibilities* provides an overview of the basic fiduciary responsibilities applicable to retirement plans under the law.

This booklet addresses the scope of ERISA's protections for private-sector retirement plans (public-sector plans and plans sponsored by churches are not covered by ERISA). It provides a simplified explanation of the law and regulations. It is not a legal interpretation of ERISA, nor is it intended to be a substitute for the advice of a retirement plan professional. Also, the booklet does not cover those provisions of the Federal tax law related to retirement plans.

## What are the essential elements of a plan?

Each plan has certain key elements. These include:

- A written plan that describes the benefit structure and guides day-to-day operations;
- A trust fund to hold the plan's assets[1];
- A recordkeeping system to track the flow of monies going to and from the retirement plan; and
- Documents to provide plan information to employees participating in the plan and to the government.

Employers often hire outside professionals (sometimes called third-party service providers) or, if applicable, use an internal administrative committee or human resources department to manage some or all of a plan's day-to-day operations. Indeed, there may be one or a number of officials with discretion over the plan. These are the plan's fiduciaries.

## Who is a fiduciary?

Many of the actions involved in operating a plan make the person or entity performing them a fiduciary. Using discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control. Providing investment advice for a fee also makes someone a fiduciary. Thus, fiduciary status is based on the *functions performed for the plan,* not just a person's title.

[1] If a plan is set up through an insurance contract, the contract does not need to be held in trust.

A plan must have at least one fiduciary (a person or entity) named in the written plan, or through a process described in the plan, as having control over the plan's operation. The named fiduciary can be identified by office or by name. For some plans, it may be an administrative committee or a company's board of directors.

A plan's fiduciaries will ordinarily include the trustee, investment advisers, all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee (if it has such a committee), and those who select committee officials. Attorneys, accountants, and actuaries generally are not fiduciaries when acting solely in their professional capacities. The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan.

A number of decisions are not fiduciary actions but rather are business decisions made by the employer. For example, the decisions to establish a plan, to determine the benefit package, to include certain features in a plan, to amend a plan, and to terminate a plan are business decisions not governed by ERISA. When making these decisions, an employer is acting on behalf of its business, not the plan, and, therefore, is not a fiduciary. However, when an employer (or someone hired by the employer) takes steps to implement these decisions, that person is acting on behalf of the plan and, in carrying out these actions, may be a fiduciary.

## What is the significance of being a fiduciary?

Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. These responsibilities include:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carrying out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA);
- Diversifying plan investments; and
- Paying only reasonable plan expenses.

The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions. Prudence focuses on the *process* for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions. For instance, in hiring any plan service provider, a fiduciary may want to survey a number of potential providers, asking for the same information and providing the same requirements. By doing so, a fiduciary can document the process and make a meaningful comparison and selection.

Following the terms of the plan document is also an important responsibility. The document serves as the foundation for plan operations. Employers will want to be familiar with their plan document, especially when it is drawn up by a third-party service provider, and periodically review the document to make sure it remains current. For example, if a plan official named in the document changes, the plan document must be updated to reflect that change.

Diversification – another key fiduciary duty – helps to minimize the risk of large investment losses to the plan. Fiduciaries should consider each plan investment as part of the plan's entire portfolio. Once again, fiduciaries will want to document their evaluation and investment decisions.

## Limiting Liability

With these fiduciary responsibilities, there is also potential liability. Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions.

However, fiduciaries can limit their liability in certain situations. One way fiduciaries can demonstrate that they have carried out their responsibilities properly is by documenting the processes used to carry out their fiduciary responsibilities.

There are other ways to reduce possible liability. Some plans, such as most 401(k) and profit sharing plans, can be set up to give the participants control over the investments in their accounts and limit a fiduciary's liability for the investment decisions made by the participants. For participants to have control, they must be given the opportunity to choose from a broad range of investment alternatives. Under Labor Department regulations, there must be at least three different investment options so that employees can diversify investments within an investment category, such as through a mutual fund, and diversify among the investment alternatives offered. In addition, participants must be given sufficient information to make informed decisions about the options offered under the plan. Participants also must be allowed to give investment instructions at least once a quarter, and perhaps more often if the investment option is volatile.

Plans that automatically enroll employees can be set up to limit a fiduciary's liability for any plan losses that are a result of automatically investing participant contributions in certain default investments. There are four types of investment alternatives for default investments as described in Labor Department regulations, and an initial notice and annual notice must be provided to participants. Also, participants must have the opportunity to direct their investments to a broad range of other options, and be provided materials on these options to help them do so. (See **Resources** for further information.)

However, while a fiduciary may have relief from liability for the specific investment allocations made by participants or automatic investments, the fiduciary retains the responsibility for selecting and monitoring the investment alternatives that are made available under the plan.

A fiduciary can also hire a service provider or providers to handle fiduciary functions, setting up the agreement so that the person or entity then assumes liability for those functions selected. If an employer appoints an investment manager that is a bank, insurance company, or registered investment adviser, the employer is responsible for the selection of the manager, but is not liable for the individual investment decisions of that manager. However, an employer is required to monitor the manager periodically to assure that it is handling the plan's investments prudently and in accordance with the appointment.

### Other Plan Fiduciaries

A fiduciary should be aware of others who serve as fiduciaries to the same plan, because all fiduciaries have potential liability for the actions of their co-fiduciaries. For example, if a fiduciary knowingly participates in another fiduciary's breach of responsibility, conceals the breach, or does not act to correct it, that fiduciary is liable as well.

### Bonding

As an additional protection for plans, those who handle plan funds or other plan property generally must be covered by a fidelity bond. A fidelity bond is a type of insurance that protects the plan against loss resulting from fraudulent or dishonest acts of those covered by the bond.

## How do these responsibilities affect the operation of the plan?

Even if employers hire third-party service providers or use internal administrative committees to manage the plan, there are still certain functions that can make an employer a fiduciary.

### Employee Contributions

If a plan provides for salary reductions from employees' paychecks for contribution to the plan (such as in a 401(k) plan), then the employer must deposit the contributions in a timely manner. The law requires that participant contributions be deposited in the plan as soon as it is reasonably possible to segregate them from the company's assets, but no later than the 15th business day of the month following the payday. If employers can reasonably make the deposits sooner, they need to do so.

For plans with fewer than 100 participants, salary reduction contributions deposited with the plan no later than the 7th business day following withholding by the employer will be considered contributed in compliance with the law.

For all contributions, employee and employer (if any), the plan must designate a fiduciary, typically the trustee, to make sure that contributions due to the plan are collected. If the plan and other documents are silent or ambiguous, the trustee generally has this responsibility.

## Hiring a Service Provider

Hiring a service provider in and of itself is a fiduciary function. When considering prospective service providers, provide each of them with complete and identical information about the plan and what services you are looking for so that you can make a meaningful comparison.

For a service contract or arrangement to be reasonable, service providers must provide certain information to you about the services they will provide to your plan and all of the compensation they will receive. This information will assist you in understanding the services, assessing the reasonableness of the compensation (direct and indirect), and determining any conflicts of interest that may impact the service provider's performance.

Some additional items a fiduciary needs to consider when selecting a service provider include:

- Information about the firm itself: financial condition and experience with retirement plans of similar size and complexity;
- Information about the quality of the firm's services: the identity, experience, and qualifications of professionals who will be handling the plan's account; any recent litigation or enforcement action that has been taken against the firm; and the firm's experience or performance record;
- A description of business practices: how plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled; and whether the firm has fiduciary liability insurance.

If your service provider is responsible for maintaining plan records and keeping participant data confidential and plan accounts secure, use a service provider who follows strong cybersecurity practices. To prudently select and monitor such a service provider, ask for:

- Information about a firm's business practices: its information security standards, practices and policies, and annual audit results available to plan clients; how it validates its practices; and whether it has insurance policies that cover losses caused by cybersecurity and identity theft breaches (whether caused by internal or external threats);
- Information about the quality of the firm's services: its track record in the industry, including security incidents, other litigation, and legal proceedings related to its services; and for prior security breaches, what happened and how it responded.

For more tips for hiring a service provider with strong cybersecurity practices, including terms and provisions recommended for inclusion in service provider contracts, visit **DOL's cybersecurity website**. For information on cybersecurity best practices that service providers should follow, see the **website**.

An employer should document its selection (and monitoring) process, and, when using an internal administrative committee, educate committee members on their roles and responsibilities.

## Fees

Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments. When the fees for services are paid out of plan assets, fiduciaries will want to understand the fees and expenses charged and the services provided. While the law does not specify a permissible level of fees, it does require that fees charged to a plan be "reasonable." After careful evaluation during the initial selection, the plan's fees and expenses should be monitored to determine whether they continue to be reasonable.

In comparing estimates from prospective service providers, ask which services are covered for the estimated fees and which are not. Some providers offer a number of services for one fee, sometimes referred to as a "bundled" services arrangement. Others charge separately for individual services. Compare all services to be provided with the total cost for each provider. Consider whether the estimate includes services you did not specify or want. Remember, all services have costs.

Some service providers may receive additional fees from investment vehicles, such as mutual funds, that may be offered under an employer's plan. For example, mutual funds often charge fees to pay brokers and other salespersons for promoting the fund and providing other services. There also may be sales and other related charges for investments offered by a service provider. The information provided by service providers noted above should include a description of all compensation related to the services to be provided that the service providers expect to receive directly from the plan as well as the compensation they expect to receive from other sources.

Who pays the fees? Plan expenses may be paid by the employer, the plan, or both. In addition, for expenses paid by the plan, they may be allocated to participants' accounts in a variety of ways. (See **Resources** for further information.) In any case, the plan document should specify how fees are paid.

## Monitoring a Service Provider

An employer should establish and follow a formal review process at reasonable intervals to decide if it wants to continue using the current service providers or look for replacements. When monitoring service providers, actions to ensure they are performing the agreed-upon services include:

- Evaluating any notices received from the service provider about possible changes to their compensation and the other information they provided when hired (or when the contract or arrangement was renewed);
- Reviewing the service providers' performance;
- Reading any reports they provide;
- Checking actual fees charged;
- Asking about policies and practices (such as trading, investment turnover, and proxy voting); and
- Following up on participant complaints.

## Providing Information in Participant-Directed Plans

When plans allow participants to direct their investments, fiduciaries need to take steps to regularly make participants aware of their rights and responsibilities under the plan related to directing their investments. This includes providing plan and investment-related information, including information about fees and expenses, that participants need to make informed decisions about the management of their individual accounts. Participants must receive the information before they can first direct their investment in the plan and annually thereafter. The investment-related information needs to be presented in a format, such as a chart, that allows for a comparison among the plan's investment options. A **model chart** is available. If you use information provided by a service provider that you rely on reasonably and in good faith, you will be protected from liability for the completeness and accuracy of the information.

## Investment Advice and Education

More and more employers are offering participants help so they can make informed investment decisions. Employers may decide to hire an investment adviser offering specific investment advice to participants. These advisers are fiduciaries and have a responsibility to the plan participants. On the other hand, an employer may hire a service provider to provide general financial and investment education, interactive investment materials, and information based on asset allocation models. As long as the material is general in nature, providers of investment education are not fiduciaries. However, the decision to select an investment adviser or a provider offering investment education is a fiduciary action and must be carried out in the same manner as hiring any plan service provider.

## Are there some transactions that are prohibited? Is there a way to make them permissible if the actions will benefit the plan?

Certain transactions are prohibited under the law to prevent dealings with parties who may be in a position to exercise improper influence over the plan. In addition, fiduciaries are prohibited from engaging in self-dealing and must avoid conflicts of interest that could harm the plan.

## Prohibited Transactions

Who is prohibited from doing business with the plan? Prohibited parties (called parties in interest) include the employer, the union, plan fiduciaries, service providers, and statutorily defined owners, officers, and relatives of parties in interest.

Some of the prohibited transactions are:

- A sale, exchange, or lease between the plan and party in interest;
- Lending money or other extension of credit between the plan and party in interest; and
- Furnishing goods, services, or facilities between the plan and party in interest.

Other prohibitions relate solely to fiduciaries who use the plan's assets in their own interest or who act on both sides of a transaction involving a plan. Fiduciaries cannot receive money or any other consideration for their personal account from any party doing business with the plan related to that business.

## Exemptions

There are a number of exceptions (exemptions) in the law that provide protections for the plan in conducting necessary transactions that would otherwise be prohibited. The Labor Department may grant additional exemptions.

Exemptions are provided in the law for many dealings with banks, insurance companies, and other financial institutions that are essential to the ongoing operations of the plan. One exemption in the law allows the plan to hire a service provider as long as the services are necessary to operate the plan and the contract or arrangement under which the services are provided and the compensation paid for those services is reasonable.

There are exemptions for the provision of investment advice to participants who direct the investments in their accounts. This applies to the buying, selling, or holding of an investment related to the advice as well as to the receipt of related fees and other compensation by a fiduciary adviser.

Another important exemption in the law – and a popular feature of most plans – permits plans to offer loans to participants. The loans, which are considered investments of the plan, must be available to all participants on a reasonably equivalent basis, must be made according to the provisions in the plan, and must charge a reasonable rate of interest and be adequately secured.

The exemptions issued by the Department can involve transactions available to a class of plans or to one specific plan. Both class and individual exemptions are available at **DOL's website**. For more information on applying for an exemption, see ***Exemption Procedures Under Federal Pension Law***.

## Additional Considerations for Plans Investing in Employer Stock

Plans that invest in employer stock need to consider specific rules relating to this investment. Traditional defined benefit pension plans have limits on the amount of stock and debt obligations that a plan can hold and the amount of the plan's assets that can be invested in employer securities. For 401(k) plans, profit sharing plans, and employee stock ownership plans, there is no limit on how much in employer securities the plans can hold if the plan documents so provide.

If an employer decides to make employer stock an investment option under the plan, proper monitoring will include ensuring that those responsible for making investment decisions, whether an investment manager or participants, have critical information about the company's financial condition so that they can make informed decisions about the stock. Participants in individual account plans must be provided an opportunity to divest their investment in publicly traded employer securities and reinvest those amounts in other diversified investment options under the plan. For employee contributions invested in employer securities, participants have the right to divest immediately. Where employer contributions are invested in employer securities, participants can divest if they have 3 years of service. This does not apply to stand-alone employee stock ownership plans where there are no employee or employer matching contributions.

A plan can buy or sell employer securities from a party in interest, such as an employer, an employee, or other related entity as described above (which would otherwise be prohibited) if it is for fair market value and no sales commission is charged. If the plan is a defined benefit plan (a traditional pension plan), the plan generally is not permitted to hold more than 10 percent of its assets in employer stock.

## How do employees get information about the plan? How are employers required to report plan activities?

ERISA requires plan administrators to furnish plan information to participants and beneficiaries and to submit reports to government agencies.

### Informing Participants and Beneficiaries

The following documents must be furnished to participants and beneficiaries.

The summary plan description (SPD) — the basic descriptive document — is a plain language explanation of the plan and must be comprehensive enough to apprise participants of their rights and responsibilities under the plan. It also informs participants about the plan features and what to expect of the plan. Among other things, the SPD must include information about:

- When and how employees become eligible to participate;
- The source of contributions and contribution levels;
- The vesting period, i.e., the length of time an employee must belong to a plan to receive benefits from it;
- How to file a claim for those benefits; and
- A participant's basic rights and responsibilities under ERISA.

This document is given to employees after they join the plan and to beneficiaries after they first receive benefits. SPDs must also be redistributed periodically and provided on request.

The summary of material modification (SMM) apprises participants and beneficiaries of changes to the plan or to the information required to be in the SPD. The SMM or an updated SPD for a retirement plan must be furnished automatically to participants within 210 days after the end of the plan year in which the change was adopted.

An individual benefit statement (IBS) provides participants with information about their account balances and vested benefits. Plans that provide for participant-directed accounts must furnish statements on a quarterly basis. Individual account plans that do not provide for participant direction must furnish statements annually. Traditional defined benefit pension plans must furnish statements every three years.

As noted above, for plans that allow participants to direct the investments in their accounts, plan and investment information, including information about fees and expenses, must be provided to participants before they can first direct investments and periodically thereafter– primarily on an annual basis with information on the fees and expenses actually paid provided at least quarterly. The initial plan related information may be distributed as part of the SPD provided when a participant joins the plan as long as it is provided before the participant can first direct investments. The information provided quarterly may be included with the IBS.

An individual benefit statement provided by a defined contribution plan also must include two illustrations of a participant's account balance as a stream of estimated monthly lifetime payments (as a single life annuity and a qualified joint and survivor annuity), at least annually. **Model language** is available.

If a plan automatically enrolls employees, the automatic enrollment notice details the plan's automatic enrollment process and participant's rights. The notice must specify the deferral percentage, the participant's right to change that percentage or not make automatic contributions, and the plan's default investment. (See **Resources** for information on a sample notice.) The participant generally must receive an initial notice at least 30 days before he or she is eligible to participate in the plan. Employers that provide for immediate eligibility can provide this initial notice on an employee's first day of employment if they allow participants to withdraw contributions within 90 days of their first contribution. An annual notice also must be provided to participants at least 30 days prior to the beginning of each subsequent plan year.

A summary annual report (SAR) outlines in narrative form the financial information in the plan's Annual Report, the Form 5500 (see below), and is furnished annually to participants. Traditional defined benefit pension plans that are required to provide an annual plan funding notice are not required to furnish an SAR.

The blackout period notice requires at least 30 days' (but not more than 60 days') advance notice before a 401(k) or profit sharing plan is closed to participant transactions. During blackout periods, participants (and beneficiaries) cannot direct investments, take loans, or request distributions. Typically, blackout periods occur when plans change recordkeepers or investment options, or when plans add participants due to a corporate merger or acquisition.

You can furnish these disclosures in paper or electronically. To provide them electronically, you may either post them on a plan website or email them to plan participants, after notifying participants that disclosures will be furnished electronically. There are a number of protections for participants receiving electronic disclosures, including the right to request paper copies of disclosures or to opt out of electronic delivery. You also need to take reasonable steps to protect the confidentiality of participants' personal information online. For more information, see **DOL's website**.

## Reporting to the Government

Plan administrators generally are required to file a Form 5500 Annual Return/Report with the Federal Government. The Form 5500 reports information about the plan and its operation to the U.S. Department of Labor, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC). These disclosures are made available to participants and the public. Depending on the number and type of participants covered, the filing requirements vary. The form is filed and processed electronically under the ERISA Filing Acceptance System II (EFAST2). For more information on the forms, their instructions, and the filing requirements, see the **EFAST2 website** and request the publication ***Reporting and Disclosure Guide for Employee Benefit Plans***. See the **Resources** section to obtain a copy.

There are penalties for failing to file required reports and for failing to provide required information to participants.

## Can a fiduciary terminate its fiduciary duties?

Yes, but there is one final fiduciary responsibility. Fiduciaries who no longer want to serve in that role cannot simply walk away from their responsibilities, even if the plan has other fiduciaries. They need to follow plan procedures and make sure that another fiduciary is carrying out the responsibilities left behind. It is critical that a plan has fiduciaries in place so that it can continue operations and participants have a way to interact with the plan.

## What help is available for employers who make mistakes in operating a plan?

The Department of Labor's Voluntary Fiduciary Correction Program (VFCP) encourages employers to comply with ERISA by voluntarily self-correcting certain violations. The program covers 19 transactions, including failure to timely remit participant contributions and some prohibited transactions with parties in interest. The program includes a description of how to apply, as well as acceptable methods for correcting violations. In addition, the Department gives applicants immediate relief from payment of excise taxes under a class exemption.

In addition, the Department's Delinquent Filer Voluntary Compliance Program (DFVCP) assists late or non-filers of the Form 5500 in coming up to date with corrected filings.

For an overview of both programs, consult **DOL's website**.

# Meeting Your Fiduciary Responsibilities

## Tips for Employers with Retirement Plans

Understanding fiduciary responsibilities is important for the security of a retirement plan and compliance with the law. The following tips may be a helpful starting point:

- Have you identified your plan fiduciaries, and are they clear about the extent of their fiduciary responsibilities?
- If participants make their own investment decisions, have you provided the plan and investment related information participants need to make informed decisions about the management of their individual accounts? Have you provided sufficient information for them to exercise control in making investment decisions?
- Are you aware of the schedule to deposit participants' contributions in the plan, and have you made sure it complies with the law?
- If you are hiring third-party service providers, have you looked at a number of providers, given each potential provider the same information, and considered whether the fees are reasonable for the services provided?
- Have you documented the hiring process?
- Are you prepared to monitor your plan's service providers?
- Have you identified parties in interest to the plan and taken steps to monitor transactions with them?
- Are you aware of the major exemptions under ERISA that permit transactions with parties in interest, especially those key for plan operations (such as hiring service providers and making plan loans to participants)?
- Have you reviewed your plan document in light of current plan operations and made necessary updates? After amending the plan, have you provided participants with an updated SPD or SMM?
- Do those individuals handling plan funds or other plan property have a fidelity bond?

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## RESOURCES

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) offers more information on its website and through its publications. The following are available on **EBSA's website** or by calling **1-866-444-3272.**

For employers:

*Reporting and Disclosure Guide for Employee Benefit Plans*
*Understanding Retirement Plan Fees and Expenses*
*Protect Your Employee Benefit Plan with an ERISA Fidelity Bond*
*Selecting an Auditor for Your Employee Benefit Plan*
*Tips for Hiring a Service Provider with Strong Cybersecurity Practices*
*Cybersecurity Program Best Practices*
*401(k) Plans for Small Businesses*
*SEP Retirement Plans for Small Businesses*
*SIMPLE IRA Plans for Small Businesses*
*Automatic Enrollment 401(k) Plans for Small Businesses*
*Automatic Enrollment Sample Notice* (web only)
*Adding Automatic Enrollment to Your 401(k) Plan*
*Profit Sharing Plans for Small Businesses*
*Retirement Plan Correction Programs*
(Also see DFVCP and VFCP fact sheets, frequently asked questions and calculators at **DOL's website**)

For employees:

*Savings Fitness: A Guide to Your Money and Your Financial Future*
*Taking the Mystery Out of Retirement Planning*
*What You Should Know about Your Retirement Plan*
*Top 10 Ways to Prepare for Retirement*
*Women and Retirement Savings*
*Online Security Tips*

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