



Trends

human resources news & trends

for the clients & friends of
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How to avoid being audited by the DOL

In 2010, the DOL conducted 3,112 civil investigations. Seventy-five percent of which resulted in findings of one or more violations. The DOL is now adding hundreds of investigators to its staff who will be responsible for enforcement of fiduciary, reporting and disclosure requirements for benefit plans. As a result, employers must be prepared for possible audit activity. Here are six ways to avoid an audit:

1 Deposit participant contributions as soon as possible.
This issue is one of the DOL's top enforcement initiatives.

ERISA requires that participant contributions, including loan repayments, be deposited to the plan's trust on the earliest date the contributions can reasonably be segregated from the employer's general assets. The DOL's position is that the "earliest date" is determined on a case-by-case basis. Because most companies have the ability to transfer funds electronically,

ACA's Uniform Summary of Benefits

On August 22, 2011, the Departments of the U.S. Treasury ("Treasury"), Labor (DOL) and Health and Human Services (HHS) jointly published proposed regulations ("Regulations") that identify the standards for the uniform explanation of coverage requirement under the Patient Protection and Affordable Care Act of 2010 (ACA). The ACA directs the Agencies to develop standards for a uniform explanation of benefits and coverage ("Summary of Benefits Coverage" or SBC) to be provided by group health plans and health insurance issuers offering group or individual health insurance to enrollees.

Who must provide the SBC?

The Regulations obligate the group health plan (including

Uniform Summary of Benefits

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the plan administrator) and, if applicable, the health insurance issuer offering coverage in connection with a group health plan (i.e., if the plan is fully insured) to provide the SBC.

Who must receive an SBC?

Basically, all individuals who are eligible to enroll in the group health plan are entitled to receive the SBC. The Regulations indicate that a “participant” and “beneficiary” as defined in ER-ISA Sections 3(7) and 3(8) are entitled to an SBC. The terms “participant” and “beneficiary” are defined broadly by ERISA and include not only those who are currently enrolled in the plan (i.e., covered employees and covered dependents), but any-one who is eligible to enroll.

When must the SBC be provided?

Generally, the SBC is provided to a participant or beneficiary at three different times:

1. At any enrollment;
2. Upon request, and;
3. When there is a material modification in the information.

How must the SBC be delivered?

An SBC provided by a plan or health insurer to a participant or beneficiary may be provided in paper form. Alternatively, for plans and issuers subject to ERISA (plans sponsored by private employers) and/or the Internal Revenue Code (e.g., church plans), the SBC may be provided electronically if the requirements of DOL’s electronic disclosure safe harbor at 29 CFR Section 2520.104b-1(c) are met. Nonfederal governmental plans may comply with either ERISA’s electronic disclosure safe harbor requirements or, alternatively, the requirements applicable to insurers in the individual market.

What happens if I don’t comply?

Potential penalties for failure to comply with the SBC requirement are severe, including agency-induced fines of up to \$1,000 for each failure to distribute an SBC and the self-reported excise tax applicable to group health plans (other than governmental plans) under Section 4980D of the Internal Revenue Code.

HRAs Exempted

Under the patient protection and affordable care act Health reimbursement arrangements (HRAs) have been exempted from the annual limit restrictions in the Patient Protection and Affordable Care Act (ACA) and do not need to apply individually for waivers or waiver extensions from the restrictions, according to August 19 guidance from the Center for Consumer Information and Insurance Oversight (CCIIO).

In June, CCIIO announced that limited benefit plans have until Sept. 22, 2011, to apply for or renew a temporary waiver from the annual limit restrictions.

In the most recent guidance, the CCIIO noted that “all HRAs set limits on the amount that can be spent and, we believe, those limits would always be less than the applicable restricted annual limit amounts. Accordingly, applying the restrictions on annual limits ... to HRAs would result in a significant decrease in access to HRA benefits. Therefore, this guidance exempts as a class all HRAs that are subject to the requirements of [ACA Sec. 2711] and that were in effect prior to September 23, 2010 from having to apply individually for an annual limit waiver for plan years beginning on or after September 23, 2010 but before January 1, 2014.”

If an employer that maintains an HRA and also maintains other coverage, whether or not that coverage is integrated with the HRA, that other coverage must meet the annual limit requirements or obtain a waiver.

What is a QSERP?

A QSERP is one of the names given to a perfectly legal strategy of shifting accrued or future benefits from a non-qualified retirement plan where contributions are not immediately deductible, cannot accumulate tax-free, are available to creditors, and cannot be rolled over – to a qualified retirement plan – where contributions are immediately deductible, can accumulate tax-free, are not available to creditors, and can be rolled over (and that is only a partial list of the ad-

vantages). What makes this strategy legal is that most plan sponsors have additional room with the Internal Revenue Code’s non-discrimination in benefits test. That is, there is space for additional benefits to accrue for highly compensated employees without a violation of the Code. Many individuals and employers with “cross-tested” retirement plans understand and use this space. The employer/plan sponsor can amend its qualified plan to slightly increase benefits for certain highly compensated employees and follow the limits of 409A.

Avoiding a DOL Audit

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the “earliest date” is often within a few days of pay dates, and sometimes even the same day. A plan sponsor cannot rely on the maximum time permitted under the regulations, i.e. the fifteenth business day of the following month.

IRS Form 5500 asks whether the employer failed to transmit any participant contributions within the period described in the regulations. This question must be answered “yes” if there have been late deposits – even if corrected by the employer. If there have been late deposits, often the DOL will send the employer a follow-up letter requesting confirmation that the employer took appropriate corrective actions. This in turn can trigger a DOL investigation will sometimes follow.

The Form 5500 is signed under penalty of perjury and plan administrators must always complete it truthfully. If a late deposit has been discovered, it should be corrected and reported on the Form 5500 as required. The only way to avoid inquiries from the DOL is to avoid making late deposits. Deposits should be made as soon as possible after each pay date on a consistent schedule. No exceptions.

2 Ensure that fees are reasonable.

The Form 5500 requires plans with over 100 participants to disclose service provider fees charged to the plan. Excessive plan fees have become another top investigative issue for the DOL, and investigators are likely to carefully review Schedule C to identify potential red flags. Also, while many administrative expenses may be paid from plan assets, some may not. If you have any doubts, contact DKY.

3 Promptly respond to participants’ inquiries or requests for information.

Certain plan documents

must be made available for examination by any participant or beneficiary. These include the latest summary plan description, latest Form 5500 or SAR, any applicable collective bargaining agreements, the trust agreement and plan document. If a participant or beneficiary submits a written request for these documents, the plan administrator must provide them within 30 days of the request. If a plan administrator does not, it may be liable for a penalty of up to \$110 per day.

The participant or beneficiary may complain to the DOL if the plan administrator does not comply with information requests. In turn the complaint will trigger an inquiry from the DOL and, depending on the response, the DOL may investigate the plan. The best practice is to keep plan records updated and organized and respond to participant or beneficiary inquiries as soon as possible. Even better is posting them to the company’s intranet.

4 Make sure your plan has a proper fidelity bond.

Another of the DOL’s targets is inadequate bonding of plan fiduciaries and individuals who handle plan funds. A company often has a fiduciary policy or a policy protecting directors and officers but not a true ERISA bond protecting the plan. Generally, the amount of the ERISA bond should be at least 10 percent of the amount of funds handled but in no event less than \$1,000 or more than \$500,000 for each plan covered.

The Form 5500 asks whether the plan is covered by a fidelity bond and for what amount. Answering this question “no” can draw the attention of the DOL, as would a bond below the required level. Plan sponsors should know what level of coverage the plan has and answer the question accordingly. If the bond is inadequate, the plan administrator should seek to increase it immediately.

5 Distribute regular, accurate participant statements.

Plans must distribute regular benefit statements

to participants and beneficiaries. For defined contribution plans, statements generally must be distributed once each calendar quarter if the plan allows participant investment direction, and once each calendar year if the plan does not allow investment direction.

6 Respond promptly to DOL letters requesting information.

Ignoring the DOL will not make them forget about you and go away.

Form 5500 filings are a common source for investigators to select plans for investigation. Red flags include plans with a large percentage of assets in real estate or other exotic investments such as paintings, non-cash contributions, loan defaults, low diversification ratios, unreasonably low rates of re-turn, an adverse accountant’s opinion and notes or disclaimers on the financial schedules. Always answer the Form 5500 truthfully. Otherwise it can carry serious consequences if discovered.

The DOL will also target a plan for investigation based on other factors, such as bankruptcy filings or media reports that a company is in financial trouble. Too often, plans sponsored by employers experiencing severe financial difficulty are vulnerable to inappropriate behaviors by the employer, such as delaying deposits of participant contributions to the plan, loans to the company or other misbehaviors. Sometimes, investigators target specific industries or simply choose plans at random.

What do you do if you receive a notice that the DOL is investigating your plan? Contact the DKY administrative staff as soon as possible and let us begin to gather the required information being requested. We will also let you know if an attorney is appropriate.

Circumstances when the 10% 401(k) distribution penalty is not applied

The economy over the past three years has created many hardships on workers and their families. As a result, we have seen a large number of retirement plan distributions and requests for distributions.

There are only certain situations where the IRS will waive the 10% 401(k) early withdrawal penalty – a withdrawal prior to the participant reaching age 59½:

- ❖ Amount of your unreimbursed medical expenses greater than 7.5% AGI (IRC §72(t)(2)(B)).
- ❖ There is a Qualified Domestic Relations Order (QDRO) from the courts that mandate funds from your account go to a former spouse, child, or dependent (IRC §72(t)(2)(C)).

- ❖ You have separated from service and were at least 55 years of age when you did so (or separated from service in the year in which you turned 55) (IRC §72(t)(2)(A)(v) and 72(t)(10)).
- ❖ You elect a Section 72(t) distribution.
- ❖ You are totally disabled. (The key to the disability exception seems to lie in the permanence of the condition, not the severity. Therefore, to claim this exemption you have to furnish not only information proving that you are totally disabled, but also information on the permanence of the disability.) (IRC §72(t)(2)(A)(iii))

- ❖ You have died and your beneficiary gets the money (IRC §72(t)(2)(A)(ii)).
- ❖ You have made contributions under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment (IRC §414(w)(1)(B)).
- ❖ Certain distributions to qualified military reservists called to active duty (IRC §72(t)(2)(G))
- ❖ Because of an IRS levy of the plan, certain corrective distributions (IRC §72(t)(2)(A)(vii))

As an alternative to an early distribution, you should also consider taking a loan or hardship withdrawal from your plan.

DKY, LLC is now the largest TPA in the Hill Country and South Texas

After the acquisition of Padgett Stratemann & Co. Retirement Plans Services Group in March 2009, DKY has grown to be the largest retirement plan and benefits TPA in the Hill Country and South Texas. Let us show you what we can do for your business or organization.

Do you have an administration need or questions about your:

- | | |
|-------------------------------------|-------------------------|
| Pension or Retirement Plan | FLSA Compliance |
| COBRA Compliance and Administration | Job Descriptions |
| Section 125/Cafeteria Plan | Employee Handbook |
| Workers' Compensation/ERISA Plan | Policy & Procedures...? |
| FMLA Compliance | |
| ADA Compliance | |

New Mandated Federal Poster

On August 25, 2011, the National Labor Relations Board (NLRB) has issued a Final Rule that will require employers to notify employees of their rights under the National Labor Relations Act. This is a new federal posting. The NLRB has until November 1 to issue the new poster and businesses are required to post by November 14, 2011.

Private-sector employers (including labor organizations) whose workplaces fall under the National Labor Relations Act will be required to post the employee rights notice where other workplace notices are typically posted. Also, employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the Board's notice on those sites.