

Summer Homework for Fiduciaries

Morgan Davis, Plan Advisor



As you bask in the glory of summer over the next couple of months, don't forget the three Fs that define this cherished season — fun, Fourth of July, and fiduciary! While you're enjoying the fruits of summer, don't forget your fiduciary responsibilities! Ask yourself the following questions to make sure you are on top of your responsibilities and liabilities.

1. Are you practicing procedural prudence when making plan management decisions?
2. Do you clearly understand the DOL's TIPS on selecting and monitoring your QDIA in order to obtain fiduciary protection?
3. Are you documenting each plan management decision and its support?
4. Are you familiar with current trends in fiduciary litigation?
5. Are you certain that your plan is being administered in accordance with your plan document provisions?
6. What fiduciary liability mitigation strategies are you following? (Fiduciaries are personally financially responsible for any fiduciary breaches that disadvantage participants.)
7. Are you kept abreast of regulatory changes?
8. Are you appropriately determining reasonableness of plan fees, services and investment opportunities?

9. How do you define “success” for your plan and what metrics do you use to track progress?
10. Is your current plan design communicating the appropriate messaging to encourage success for your participants and plan fiduciaries?
11. Is your menu efficiently designed for benefit of participants and plan fiduciaries?
12. Are you certain you are providing all required communications and distributions to plan participants (including former participants with account balances)?
13. Are you handling missing participants appropriately?
14. Are you appropriately monitoring and documenting your fiduciary activities and those of your service providers?
15. Are you maintaining plan records appropriately?

Many fiduciaries are unaware of their fiduciary responsibilities or do not understand them. As you contemplate these important questions while staying cool this summer, if you need help uncovering the answers to any of these important questions, do not hesitate to ask your plan advisor.

About the Author, Morgan Davis

Morgan is responsible for guiding plan sponsors through the intricacies of investment analysis and innovative plan design and making it easy to understand. Blending employer and employee objectives, Morgan encourages plan design initiatives to create optimal retirement plan outcomes for participants. Morgan is a graduate of Michigan State University where she earned a Bachelor of Arts in marketing.

The SECURE Act

Legislation to help Americans save more for retirement.

It's no secret that Americans are not saving enough for retirement. The U.S. Government Accountability Office (GAO) recently reported that 48 percent of households aged 55 and over have no retirement savings.

To address this issue, a new retirement-related bill is making its way through Congress, The Setting Every Community Up for Retirement Enhancement (SECURE) Act. Its purpose is to help Americans save more for retirement by creating new rules to expand and preserve retirement savings, improve the administration of retirement plans, provide additional benefits and create revenue provisions.

Highlights of the Act include:

Increase Auto Enrollment Safe Harbor Cap

Qualified automatic enrollment arrangements (QACAs) would be able to auto increase employee deferrals up to 15 percent instead of the currently required 10 percent cap.

Pooled Employer Plans (aka Open MEPs)

The legislation will allow for a new type of plan whereby unrelated employers could pool their resources to optimize buying power in a new type of plan called a “pooled employer plan” (PEP). By and large, the PEP is what was previously referred to as an open multiple employer plan (open MEP). Open MEPs were an issue that PEPs are designed to remedy. PEPs would be treated as a single plan under ERISA. The legislation also purports to eliminate the “one bad apple” rule whereby the qualification issue of one adopting employer would not taint the qualified status if the entire PEP for the remaining adopting employers.

Increase Credit Limit for Small Employer Plan Start-Up Costs

To make it more affordable for small businesses to implement retirement plans, the legislation will increase the credit for small businesses by changing the calculation of the flat dollar amount limit on the credit to the greater of (1) \$500 or (2) the lesser of (a) \$250 multiplied by the number of nonhighly compensated employees of the eligible employer who are eligible to participate in the plan or (b) \$5,000. The credit applies for up to three years.

Child Birth or Adoption Withdrawals

The SECURE Act would allow participants to take up to \$5,000 from their plan or IRA for birth, or adoption, related expenses incurred within a year of the action. These could be taken on a penalty-free basis.

Small Employer Automatic Enrollment Credit

The legislation will create a new tax credit of up to \$500 per year to small employers to provide for startup costs for new 401(k) plans and SIMPLE IRA plans that include automatic enrollment.

Allowing Long-Term and Part-Time Workers to Participate In 401(k) Plans

Under current law, employers are not required to include part-time employees (those working less than 1,000 hours per year) in their defined contribution plan. The legislation will require employers maintaining a 401(k) plan to have at least a dual eligibility requirement under which an employee must complete either one year of service (with the 1,000-hour rule) or three

consecutive years of service where the employee completes at least 500 hours of service, except in the case of collectively bargained plans. For employees that are eligible based solely on the second new rule, employers may exclude those employees from testing under the nondiscrimination and coverage rules and from the application of top-heavy rules. In addition, those employees that are eligible based solely on the second new rule may be excluded from employer contributions.

Other Changes

Other changes such as increased filing failure penalties, PBGC premiums, 529 plans, some tax implications to certain identified individuals, and church plans are also included in the legislation.

It's important to note that the SECURE Act is not yet finalized and has not been signed into law. As always, we will stay abreast of the legislation and will inform you when any significant changes are made.

Hey Joel!

Hey Joel! – Answers from a re-covering former practicing ERISA attorney

Welcome to Hey Joel! This forum answers plan sponsor questions from all over the country by a former practicing ERISA attorney.

Hey Joel,

One of my current employees recently received a notice from Social Security saying that they might be entitled to a retirement benefit. Is it my responsibility to track this money down?

- Investigating in Illinois

Dear Investigating,

Employers are required to file Form 8955-SSA with the IRS each year to report former participants with balances remaining in the plan. The information is provided to the Social Security Administration, which



in turn notifies retirees of benefits.

While the form does allow employers to “un-report” these participants once they take distributions, it is common practice to only list newly terminated employees without ever removing those who have received their benefits.

I suspect that the employee in question here recently filed a claim for Social Security benefits and that the Social Security Administration (SSA) sent them a letter stating that they MAY be entitled to pension benefits under the plan. But I also suspect that they plan paid the employee their account balance back when they terminated employment. But, without clear records showing that the employee already received their benefits, it may be difficult for the employer to

convince the employee that the letter they received from the SSA is incorrect.

So, what is an employer to do? Here are my general thoughts.

1. Check and see if someone at the employer has kept Form 1099Rs for plan distributions.
2. Check with the prior recordkeepers and see if they still have any participant records for the plan that would show distributions.
3. I don't think the Form SSA is available to look up online, and as noted earlier, most employers do not "un-report" participants after they have received their benefits. But, if the employer does have past Form SSAs they can access, it would not hurt to at least take a look and see if the form lists previously reported participants who have received their benefits.
4. If the employer cannot come up with any records that show the employee previously received their benefits from the plan, the employer could advise the employee that a) the employer has no records showing that the employee is owed money from the plan, b) they may have been listed on a Form SSA way back in 2003 showing that they had an account balance under the plan, and c) the employee likely previously received their benefit from the plan sometime following termination of employment. The employer should include a copy of the plan's SPD along with the following note: "Attached is a copy of

the plan's Summary Plan Description, which includes a description of the plan's claims procedure. The claims procedure outlines what the plan requires for you to file a claim and information on where to file, what to file, and who to contact if you have questions."

5. Going forward, the employer should put in place a system to retain all participant distribution forms and Form 1099Rs.

Always Scrutinizing,

Detective Joel Shapiro

About the Author, Joel Shapiro, JD, LL.M

As a former practicing ERISA attorney Joel works to ensure that plan sponsors stay fully informed on all legislative and regulatory matters. Joel earned his Bachelor of Arts from Tufts University and his Juris Doctor from Washington College of Law at the American University.

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