

employee benefits update

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Selecting the right specialists for your plan

Plan sponsors often select several specialists to handle various responsibilities related to their qualified retirement plans. A full understanding of these key players can help you decide if you're paying the best price for services and protecting your plan's investments. Let's review the various specialists and their functions to help ensure you make the most informed choices.

Plan sponsor or plan administrator

Usually an individual employer representative or group of employer representatives serves as the plan sponsor, also referred to as the "plan administrator." The plan sponsor ultimately takes responsibility for the plan's design and administration. Larger companies often have a retirement plan team, with a leader who's designated to approve the final decisions. Typically, this individual has signing authority when a signature is required on matters related to the plan. These matters might include hiring other

service providers, such as consultants or attorneys, and determining plan provisions, such as entry dates and vesting.

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The plan sponsor also advises participants and beneficiaries about their rights and distribution options. Finally, the sponsor approves and processes government reports and keeps plan records.

Plan trustee

Your plan document will specifically name the trustee. This person or organization holds legal title to the plan's assets and is responsible for the safeguarding and investment of those funds. In many



companies, this is a key or principal employee such as the chief financial officer (CFO) or owner. In some cases, the plan document will specify a corporate trustee, such as a bank or financial institution.

Plan trustees have discretionary authority over the plan's assets. In some situations, the trustee functions as the plan sponsor as well.

Third-party administrator

The third-party administrator (TPA) is an individual or entity independent from the sponsor and trustee that's responsible for the recordkeeping and reporting issues related to the plan. The TPA should advise the plan sponsor about compliance issues and ensure that assets are funded and distributed properly. The TPA also generally prepares the Form 5500 and other filing deadline requirements.

The TPA has no discretionary authority over the plan. Generally TPAs work as a buffer in conjunction with the trustee and plan sponsor so that there's a proper alliance of checks and balances in the plan. TPAs also operate on a consulting basis to assist the plan sponsor with the plan's operations.

Investment advisor

This individual, sometimes also referred to as an investment custodian, is generally a broker or other investment specialist. Before retaining an advisor, make sure he or she is licensed and able to articulate how he or she will help you and your participants understand the various mutual funds and other investment platforms available under the plan.

The advisor should be capable of analyzing trust and plan service requirements and work with the plan sponsor to implement the plan's investment platform and meet the needs of the sponsor in terms of designing the overall plan. He or she should be willing to provide as much clarification and simplification as necessary to the plan participants and sponsor.

The advisor should provide comprehensive materials that communicate retirement planning concepts to participants. Initial and ongoing education should include on-site presentations and materials

When it goes wrong

So how important is selecting your plan specialists? In *Solis v. Koresko*, the U.S. Department of Labor (DOL) sued a plan's administrator, the owner and related attorneys for improper retirement plan administration.

The DOL determined through an investigation that the administrator had failed to pay correct death benefits to the families of participants who had passed away. And fund assets of more than \$1 million were misappropriated and used by the plan sponsor and its corporate attorneys. Misapplied assets included lobbying expenses unrelated to the plan. The suit seeks a full reimbursement into the plan and removal of involved parties from the plan's administration.

This is a good example of the importance of scrutinizing the specialists involved in administering your plan. By researching your plan specialists, you should be able to avoid any improprieties.

relevant to employees' ages. Most investment platforms provide participants on-line, 24-hour access to their accounts.

During economic downturns, your investment advisor should help you look for ways to save money. This includes shopping for the best investment platform options for the plan, exploring new mutual fund and investment options and helping sponsors become educated about plan investments.

Know all your key players

You'll also employ accountants, actuaries, attorneys and special consultants to provide services, advice and overall support for the plan's operations. Proper implementation and designation of responsibilities will help ensure that your plan is administered properly, complies with laws and regulations, and stays current with recent legislative updates. It can also help prevent your plan from being taken advantage of by unscrupulous parties. (See "When it goes wrong" above.) 🕒



Upcoming compliance deadlines:

- 10/1** Deadline for setting up a SIMPLE plan for 2010
- 10/15** Extended deadline for filing 2008 Form 5500
- 10/15** Extended deadline for filing 2008 individual tax returns
- 11/1** 2010 SIMPLE plan notice due to current plan participants
- 12/1** 2010 safe harbor plan notice due to participants

Are you asking the right questions?

YEAR END RETIREMENT PLAN CONSIDERATIONS

With the calendar year end fast approaching, plan sponsors have a lot on their minds. Tax ramifications, ERISA compliance concerns and other important retirement plan matters all merge at this time of year. Here are some questions that you need to ask.

1. Is my plan document restated for EGTRRA?

You must “restate” your retirement plan documents to incorporate the retirement plan laws under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). The deadline for document restatements for most defined contribution plans is April 30, 2010.



Your third-party administrator (TPA), the company sponsoring the plan or your ERISA attorney should have communicated the deadline that applies to you and given you an opportunity to update your documents. Making these restatements provides a perfect opportunity to overhaul the plan design and add or change plan provisions.

2. Does my company have the best plan design considering the economy?

When answering this question, consider employee participation, demographics, company goals and your investment platform’s strength. If your employees aren’t participating in your 401(k) plan, you may want to hold a special meeting to encourage participation and increase enrollment. Also assess the employer’s matching contribution; now may be a good time to make adjustments. If your plan has experienced significant losses or your investment advisor isn’t providing ample support, it also may be a good time to look at other investment platforms.

Another key factor to consider is fees. Review how you pay fees and how much your plan allocates back to participants. The Department of Labor

(DOL) and IRS guidelines allow plans to pass some expenses onto the employees, including annual administrative and auditors' fees. These rules can get extremely complex and technical, so it's best to seek the advice of an administrative or ERISA expert in these areas.

3. Should my company begin or continue a suspension of matching contributions?

Some companies have suspended their matching contributions in 2009. This may include safe harbor contributions or discretionary contributions. Suspending matches can provide employers with significant savings, but it's important to understand that it may also result in a lower employee participation rate.

Now is a good time to consider whether it makes sense to begin or continue a match suspension and its impact on the plan and your employees. The same holds true for discretionary profit sharing contributions that are funded into the plan.

4. Do we have a partially terminated plan due to employee layoffs?

Many companies have significantly reduced their staff due to the economic downturn. In some situations, this can result in a partial plan termination, particularly if more than 20% of your employees have been terminated. Consult with a retirement expert if you're concerned about a partial termination. If your plan has experienced a partial termination, you must consider affected plan participants 100% vested and give them access to their retirement accounts under the terms of your plan document's distributable events.

5. Should we terminate the plan?

If you've suspended contributions and employees aren't participating, you may consider terminating the plan. Although it may seem to alleviate temporary problems — especially in fees — other important issues would arise. Terminating a plan would require additional fees such as final IRS filings

(Form 5500 and 1099R filings), payout expenses, and asset liquidation and distribution. You also would have the time and expense of locating terminated and lost participants to make distributions.

Outstanding loans can further complicate the issue with time and expense related to final administration. And don't forget to consider the expense of starting up a new plan at a later date, which you likely will need to do when the economy improves in order to attract and retain the best employees.

More questions to ask

There's even more to consider at this time of year. For example, be prepared for general administrative issues such as providing TPAs with a company census.

Now is a good time to consider whether to continue a match suspension and its impact on the plan and your employees.

Make sure employee personnel files are in good order. Include all the appropriate enrollment forms, deferral elections and other vital information related to the plan in the sponsor's files. In certain audit cases (where retirement plans have more than 120 eligible employees), the DOL or IRS will review this information for specific employees under investigation.

The right answer

As calendar year end 2009 approaches, and in light of the EGTRRA document restatement requirement, it's a great time for employers to consider their plan design arrangements and the costs and expenses of maintaining a retirement plan. Now more than ever, you need to consider not only the company's needs, but also your employees'. Examining the future maintenance of your retirement plan may lead to an even better retirement vehicle for all parties. ☺

Electronic filing tips for 2009 Form 5500

Beginning with the 2009 plan year, there will be some major changes in Form 5500 filings for retirement, welfare and 403(b) plans. EFAST2 — the Department of Labor’s (DOL’s) second generation ERISA Filing Acceptance System — is expected to be operational beginning Jan. 1, 2010. Except for Form 5500-EZ and short 2009 plan years, you must file all 2009 Form 5500s electronically.

Filing requirements

You can prepare and submit your filing using the DOL’s IFILE software or third-party software. In either case, the DOL requires electronic signatures. Once EFAST2 is functional, you’ll be able to obtain signature credentials by registering on the DOL Web site. Signing credentials that were previously obtained for the optional EFAST electronic filing won’t be valid under EFAST2.

Electronic credentials will be available for the filing author, filing signer, schedule author, transmitter and third-party software developer. How you do the filing and who performs the function will determine which signatures are necessary. The signing credential is



personal and EFAST2 will assign only one per e-mail address. However, you can use the same credential for multiple signing functions.

Processing the form

The submission process will also vary depending on which software system you use, but one thing is clear. You’ll be able to use third-party software to validate the data before submission. After you transmit the filing, EFAST2 will determine whether it can process the file. If it can, the DOL will issue an acknowledgment ID and consider the Form 5500 filed.

EFAST2 will then check the filing for errors. If errors are found, you must correct them and then resubmit the entire filing, with all schedules attached, as an amended return.

Errors that EFAST2 checks for include:

- › Missing signatures or dates for the form or schedules,
- › Plan sponsor EINs that differ from year to year — unless reported as having changed,
- › A filing year that’s greater than 12 months or has a gap from one year to the next,
- › If the return is marked as “Final,” participant count or assets that aren’t zero,
- › A business code that’s out of date or invalid, or plan characteristic codes that don’t correspond to the benefits provided,
- › Funding and benefit arrangements that don’t cross-reference properly with the appropriate schedules, and
- › Attached schedules that don’t match what’s reported in the Form 5500, or the absence of the appropriate financial schedule, H or I (based on small or large plan status).

If the plan requires an audit, your filing must include an attached PDF of the signed audit on the audit firm's letterhead with its address. Although EFAST2 won't reject the filing if you fail to include the audit, the system will know immediately that the audit hasn't been attached and the time frame for amending will be shorter than in the past.

Making changes

The Form 5500 itself will also see some changes for 2009. In particular, Schedule C for expense disclosure for large plans will require reporting of both direct and indirect fee payments from the plan, as well as service providers who fail to provide information.

Schedule SSA and a copy of Form 5558 will no longer be part of the filing. However, you'll still need to timely file Form 5558 for an extension of the filing deadline. And a new form for small plans, Form 5500-SF, will be available.

Moving forward

With the move to electronic filing, it's important that you not wait until the last minute — either for establishing your signing credentials or for filing your submissions. And remember, you're still required to keep a paper copy of the complete, signed Form 5500 in the sponsor's files. 🕒

Spouse vs. estate vs. retirement plan beneficiary forms

Just how important are those beneficiary forms that your participants fill out when entering your retirement plan? Very! The U.S. Supreme Court ruled in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan* that a plan's beneficiary form took precedence over a divorce decree.

Here's a quick review of the facts: Mr. Kennedy completed a beneficiary designation form naming his wife as the beneficiary for purposes of his employer's plan. Later, Mrs. Kennedy signed a divorce decree that divested any of her claims to Mr. Kennedy's benefits under his employer's retirement or pension plans.

Mr. Kennedy died, and the plan paid out the benefits to Mrs. Kennedy, as stipulated in the beneficiary designation form. The estate sued, claiming that Mrs. Kennedy had waived her rights to this money within the contents of the divorce decree.

The Supreme Court, however, ruled that "ERISA provides no exception to the plan administrator's duty to act in accordance with plan documents." The only plan document available — the original beneficiary designation form — stipulated that the plan benefits would go to Mrs. Kennedy, and the Court ruled that the divorce decree didn't rise to the level of a qualified domestic relations order (QDRO). Therefore, the distribution made to Mrs. Kennedy was proper.

In light of this ruling, make sure that your plan participants are aware that courts will consider only plan documents when it's time to determine the beneficiary of their account. Divorce decrees and other similar outside documents won't be considered relevant to the determination process, unless the document is a QDRO. Completing an updated beneficiary designation form is the safest way for participants to ensure that their money will actually go to their intended beneficiaries.