Plan Insight – February 2021

Continuity, Coronavirus, ERISA, Stimulus Package

The coronavirus relief includes a "temporary rule preventing partial plan terminations" for plan sponsors of defined contribution retirement plans. The provision specifically states, "A plan shall not be treated as having a partial termination (within the meaning of 4119(d)(3) of the Internal Revenue Code of 1986) during any plan year which includes the period beginning on March 13, 2020 and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the number of active participants covered by the plan on March 13, 2020."

This provision allows defined contribution retirement plan sponsors to avoid the requirements that terminated participants must be 100% vested in plan benefits. Prior to the adoption of this provision, they would have triggered partial plan termination due to layoffs, furloughs, or terminations of employment if they experienced a reduction in eligible employees equal to or exceeding the IRS's 20% presumptive threshold. Ultimately though, the determination of partial plan termination is a facts and circumstances test.

Private Equity Investments in Defined Contribution (DC) Plans

Private equity funds invest in privately held companies whose stock is not traded on public exchanges. Private equity fund managers expect to increase the value of their investments by providing capital and acumen for the purpose of improving performance/value of these companies.

The Department of Labor (DOL) recently released an “information letter” regarding the potential inclusion of private equity investments in DC plans. The DOL indicated that it will allow DC plans to offer indirect investment in private equity funds in certain circumstances but, questions remain, are they a good fit for your plan participants and what are the fiduciary liability implications?

The DOL guidance only covers allocation decisions made by the fund’s asset managers when private equity would be one of multiple categories of equity investments within the fund (e.g., target date funds). The guidance does not cover a defined contribution plan allowing individual participants to invest their accounts directly in private equity investments. Further, the guidance was clear that investments in private equity investments present substantial legal and operational issues for fiduciaries of ERISA individual account plans. One issue concerns the typical multiyear holding period for portfolio companies, and the challenge in providing an accurate stock valuation before a sale.

The DOL letter states that plan fiduciaries considering a private equity investment option in multi-asset class funds should consider:

- Whether the fund has managers with “the capabilities, experience, and stability” to handle private equity.
- Whether the proportion of the fund’s allocation to private equity investments is appropriate based on the “cost, complexity, disclosures, and liquidity” considerations.
- Whether the fund has “adopted features related to liquidity and valuation” that give participants the ability to move their investment allocations “consistent with the plan’s terms”
- The fund suitability in light of the plan’s “participant profile,” including their ages, contribution and withdrawal tendencies.

These considerations are somewhat interpretational and can lead to issues which create potential fiduciary liability.

When considering the inclusion of any investment the plan fiduciary must act with skill, care, and due prudence in determining the suitability for participants. This responsibility applies even more importantly for private equity investments, whether a single or multi asset investment option.

Common Fiduciary Errors

An ounce of prevention is worth a pound of cure. This saying is universal, and certainly applies to fiduciary responsibility. Beginning the year with an eye towards avoiding some of the most common errors makes sense. Most fiduciary errors are unintentional or even well meaning. Here are some examples.

Following Plan Documents and Communicating Changes
Possibly the most frequent source of fiduciary breach, interpretation of plan provisions is not always intuitive. The remittance of participant deferrals "as soon as administratively possible" means as soon as possible, not as soon as convenient. A common response when a plan administrator is asked how they determined applicability of a specific plan provision (e.g., eligibility for employer match) is "the prior administrator told me how to do it". This response does not necessarily instill confidence that it is being handled correctly. Many administrative errors go on for years, and every year not corrected is another fiduciary breach. A common example is the management of plan forfeitures (non-vested assets left in plan by a terminated participant). The rule is to allocate these assets annually at years end. This can be a costly and administratively cumbersome correction, but all too often it's not accomplished annually which violates the rule forbidding plan unallocated assets.

The definition of compensation in the plan document may not be the same definition used by your payroll department/service. Furthermore, many plans and employers have different naming conventions for the various money types: deferrals, employer match, bonuses, pre-tax health insurance premiums, FBA plan, commissions and tips, or fees for professional services may be included as compensation. When plan documents are changed or updated, compensation administration needs to follow. It is a good idea to check this periodically to ensure consistency.

Participant loans are another area that can cause issues, especially if more than one loan is allowed at a time or loan payback is allowed to continue post termination of service.

Often, plan operations do not match up with the plan terms. This includes the terms in plan documents, the summary plan description, loan procedures, and an Investment Policy Statement (IPS).

Changes in the plan should be communicated to plan participants. A summary of material modifications should be given to plan participants within 210 days after the end of the plan year in which the modifications were adopted.

Participant Eligibility

Plan documents should have a definition of employees (hours worked or elapsed time) and the requirement for eligibility to participate and employer contributions. The manner which hours are calculated, hiring dates, or compensation calculations could be problematic. ERISA does not recognize the term "part-time employee." It strictly takes into consideration hours worked or elapsed time to determine eligibility for deferrals and employer match. In addition, the SECURE Act just created additional requirements as regards long-term part-time employees' eligibility.

ERISA Reporting and Recordkeeping

Employers are required to maintain records relating to employee benefit plans per ERISA. Record maintenance varies by type of document for both plan level and participant level records. Plans with 100 participants or more must file Form 5500 Annual Returns/Reports of Employee Benefit Plan and conduct an annual audit. Smaller plans must also file annual reports, with plans with less than 100 participants filing Form 5500-SF.

Investment Policy Statement

Maintaining and following an IPS is of utmost importance. There have been successful lawsuits where an employer acted in the best interest of participants, but IPS had requirements that the fiduciaries failed to follow to the letter and the result was costly to plan sponsors.

Understanding and Discharging ERISA Fiduciary Responsibilities

Many plan sponsors and fiduciaries are not fully aware of their roles/responsibilities. ERISA law pertaining to DC plans is quite complex and sometimes unintuitive and unclear (What does "procedural prudence" really mean?). Our Fiduciary Fitness Program is designed to gauge the fiduciary health of your plan, explain applicable fiduciary mitigation strategies, and to remedy, and hopefully avoid, fiduciary breaches. It is quite comprehensive, clear, and includes the ERISA required documentation.

Correcting ERISA Compliance Mistakes

Many ERISA compliance problems can be corrected through voluntary compliance programs, when detected early by the plan, to reduce the potential for fines and penalties. The Department of Labor has the Delinquent Filer Voluntary Compliance Program (DFVCP) and the Voluntary Fiduciary Correction Program (VFCP). Through these programs, Plan Administrators can file delinquent annual reports through the DFVCP, and the VFCP allows fiduciaries to take corrective measures resulting from certain specified fiduciary violations for relief from enforcement actions. In addition, the Internal Revenue Service (IRS), through the Employee Plans Compliance Resolution System (EPCRS), has both the Voluntary Compliance Program (VCP) and Self Correction Program (SCP) which allow plan sponsors and other plan fiduciaries to correct failures in the plan's operational compliance prior to being discovered by the IRS.

The best answer to these concerns is to avoid fiduciary breaches. Financial professionals can often detect the possible emergence of potential fiduciary breaches before they manifest and consult on options to avoid these breaches altogether.

This Month's Participant Memo

Participant Corner: Don't Skip the Match

This month's employee memo encourages employees to conduct a regular examination of their retirement plan to determine whether any changes need to be made.

By not maximizing the company match,

Jagger will leave **$1,000**

on the table in one year.

By the time Jagger reaches retirement age, he will have left more than

$43,000

on the table.

If Jagger put the extra $1,000 towards his retirement, assuming an average return of 10% per year, (from 22 to 65) the $1,000 per year would grow to

$592,400

On average, employees leave

$1,336

in matching funds on the table each year.[1]

Don't make the same mistake!

[1]2015 Financial Engines study.

Earn your full savings potential by hitting the full match plus more. For help finding the correct deferral amount for you, contact our Advizrs Retirement Plan Consultant at PlanInsight@advizrs.com.

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