

JANUARY 2015

ERISA Newsletter

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Legal Compliance Considerations for 2015 John C. Hughes, Esq.



The new year presents an excellent opportunity to consider your retirement plan's legal compliance (past, present, and future). The following is a short list of issues and questions aimed at limiting your exposure and best achieving your goals in 2015.

- ***Fiduciary Processes.*** Fulfillment of fiduciary duties under ERISA requires engaging in "process," and documenting that process. What processes do you have in place to ensure fulfillment of your fiduciary duties, and how are those processes documented?
- ***"Internal Controls."*** The IRS continues its focus on internal controls. Internal controls are processes and reviews aimed at identifying (and preventing) errors relative to your plans' operations and document updates. What internal controls do you have in place to ensure compliance (and/or in order to identify where compliance has not been achieved so that the matter may be appropriately remedied under IRS guidance)?
- ***404a-5 Disclosures.*** The "404a-5" regulations require employers to furnish participants with notices (annually and quarterly) containing detailed specified information. What efforts have you undertaken to ensure your compliance with these regulations? Are the 404a-5 notices that you are sending to your participants compliant? What actions are being taken to document your compliance with 404a-5?
- ***408(b)(2) Fee Disclosure.*** The "408(b)(2)" regulations require certain plan service providers to make disclosures to plan fiduciaries regarding the scope of their work and their compensation. The 408(b)(2) regulations further require that plan fiduciaries assess those disclosures to ensure the plan's arrangement with the service provider is reasonable. Did you obtain 408(b)(2) disclosures from all service providers who were required to provide them? Were the disclosures understandable? How did you assess (and document) reasonableness?
- ***Determination Letter Applications.*** Does your plan need to be submitted to the IRS for a determination letter during "Cycle E"? Cycle E opens on February 1, 2015 and ends

on January 31, 2016. There are many important considerations associated with submitting an application for a determination letter to the IRS, including ensuring that the new plan document and application are accurate and complete. It is also compelling to “scrub” the plan so that any problems may be identified and appropriately remedied before the IRS identifies them on examination.

- **Preapproved Plan Restatements.** We are now in the middle of the 2-year period during which sponsors of prototype and volume submitter plans must adopt a restated version of their plan document (and submit it to the IRS for a determination letter, if desired). Have you heard from your document provider with regard to restating yet? The same considerations apply here as with regard to Cycle E determination letter applications discussed above (that is, ensuring that the plan is in good order prior to submission).
- **M&A.** Is there any merger and acquisition activity on the horizon? If so, there are numerous plan related considerations (pre- and post-acquisition), including those relating to subsequent plan mergers (as opposed to company mergers).
- **Annual Testing.** Are you properly performing (and documenting) required IRS nondiscrimination testing?
- **Plan Design Changes.** Are you considering design changes for 2015? Plan design changes should always be carefully considered and appropriately implemented from document and operational standpoints to avoid qualification failures.
- **Controlled Groups (and Affiliated Service Groups).** Are you properly recognizing controlled group status? For example, have the appropriate employers adopted the plan (or have their employees been properly excluded if that is the desire)? If an employer is part of a controlled group or affiliated service group, it has wide ranging impacts on a plan.
- **Late Deposits.** Late deposits of participant contributions continue to be a challenge for employers (and remain an issue of focus for the DOL). Identifying instances of late deposits and appropriately correcting (and reporting) the issue will prevent problems and save money.
- **ERISA Budget Accounts.** Are you utilizing an ERISA budget account? If so, is the arrangement legally compliant? Are changes to the plan document necessary?
- **Form 5500s.** Have Form 5500s been accurately completed and timely filed (and appropriate proof of filing maintained)? The DOL and IRS use Form 5500 as a tool to identify problem issues and target plans for investigation.
- **Default Funds/QDIA Compliance.** Are you attaining the protections afforded by the “QDIA” regulations? Compliance with the QDIA regulations is not simply a matter of sending out a notice (in fact, the notice requirement itself is multifaceted).

- **SPD.** Has your SPD been timely updated? Is the current SPD accurate and compliant with ERISA's style and content regulations?
- **Employee Exclusions.** Are you excluding part-time and/or temporary employees from plan participation? If so, does the plan provide for such exclusion in a permissible manner? Many employers erroneously assume that part-time and/or temporary employees are excluded; however, there are strict rules that apply in doing so.

Appropriately addressing the foregoing questions will not only allow you to avoid or decrease potential liabilities, but will assist you in providing participants with a plan that is workable, understandable, and achieves your goals. Many of these issues are not limited to qualified retirement plans and also apply to other types of plans, such as welfare and nonqualified plans.

Please contact Jeffery Mandell (jeff@erisalawgroup.com) or John C. Hughes (john@erisalawgroup.com) at 208-342-5522 or 866-ERISALAW if you wish to discuss your plan specifics.

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Firm Recognition

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