

Employee Benefits Update

AN INFORMATIONAL NEWSLETTER FROM WISS' EMPLOYEE BENEFITS PLAN PRACTICE

Are you a Fiduciary?



The dictionary defines a fiduciary as "a person to whom property or power is entrusted for the benefit of another." When you are talking about employee benefit plans, however, the more important definition is the one recognized by the Department of Labor (DOL).

According to the DOL, fiduciary status is assigned based on the *functions* performed for the plan, not by title. A fiduciary is anyone having control over the operation of the plan, and all individuals who exercise discretion in the administration of the plan. So while you may not be named specifically as a fiduciary in the plan documents, you may have status as a fiduciary based on your role or authority.

Very often the fiduciaries of a plan also manage the business. How do you know what hat you're wearing at any particular time? The acid test is this: You are a *business manager* when you make decisions on behalf of the business, such as the decision to establish, amend or terminate a plan, the determination of the benefit package and the inclusion of particular features in the plan. You are a *fiduciary* when you make decisions associated with the implementation and administration of the plan as set forth in the Summary Plan Description.

The role of a fiduciary is one not taken lightly. The nature of the responsibilities borne by fiduciaries makes them subject to certain standards of conduct, and not adhering to them puts one at risk of serious personal liability.

The Importance of Timely Contributions to Employee Benefit Plans

Have you been waiting until the 15th business day of the next month (or close to it) to deposit deferral contributions? If so, you may be flirting with the devil.

The Department of Labor (DOL) rules state that employee deferrals must be remitted to the Plan at the earliest date on which the contributions can be *reasonably segregated* from the employer's general assets. The regulations further state that in no event shall the funds become Plan assets later than the 15th business day of the month following the month the participant contribution was withheld or received by the employer.

Some Plan administrators mistakenly interpret this regulation to mean that they can safely wait until the middle of the following month to make the deposit. However, the DOL has historically ruled that "reasonable segregation" prevails and therefore, the 15 days provides no safe harbor.

According to the DOL, participant deferrals are considered Plan Assets, and if you don't remit these funds in a timely manner, it amounts to a prohibited use of funds and a serious breach of fiduciary responsibility. The DOL looks at the failure to deposit contributions on time as depriving the participant of earnings on the contributions. The retention of participant contributions by the employer is, in effect, a loan to the employer and strictly prohibited.

In addition to corrective contributions, the

penalties are stiff. Excise taxes can quickly escalate and the fiduciary is considered in breach of duty, possibly subject to criminal penalties.

Accounting for corrective actions can get voluminous. Unless you catch and correct a late deposit right way, a single failure to make timely payments can result in having to file additional forms for every year that is affected. Further, if your Plan requires an audit by an independent certified public accountant, any material or immaterial prohibited transaction (including late deferrals) must be disclosed in the audited financial statements.

Voluntary corrective actions are available, but the best protection is to follow the rules, institute policies and procedures and monitor compliance. The DOL

recommends the following steps to help minimize the potential for violation:

- Evaluate current administrative procedures to ensure that participant elective deferrals are remitted to the plan's trust as soon as they can reasonably be segregated from the employer's general assets;
- Periodically coordinate with third-party payroll providers to ensure that elective deferrals have been appropriately withheld from the paychecks of participants; and
- Establish internal controls and audit procedures to ensure that violations are discovered as quickly as possible ▽



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This newsletter was created to inform our clients and business associates of changes occurring in the Employee Benefit Plan Industry. If you know someone who would like to receive this newsletter please contact Francine Henry at fhenny@wiss.com or call 973.994.9400.