

THE DEPARTMENT OF LABOR AS PLAN INVESTMENT ADVISOR

The Department of Labor's publication last year of rules regarding qualified default investments and the content of participant statements surprised many in the benefits community by the extent to which the DOL was willing to endorse equity investments as the "right" way to invest for retirement. More recent developments suggest that the DOL has a rather expansive view of its own role in dictating retirement plan investment policy.

A colleague recently reported that the DOL, in connection with a plan audit, is demanding that an employer contribute lost earnings because elective deferrals were not subject to participant direction quickly enough. In the particular case, 401(k) deferrals were timely deposited into the plan's money market account. In accordance with the plan's long-standing practice, elective deferrals, along with a share of the money market earnings, were transferred into the participant's individual direction account on a quarterly basis. The DOL asserts that the employer should make up lost earnings, presumably the difference between the money market return and return that could have been obtained in equity investments, for all years going back to the beginning of 2001.

As one benefits attorney has pointed out, the Department of Labor's current regulations regarding elective deferrals address how quickly funds must move from the employer to the plan. The regulations do not address how quickly a participant must be given the right to direct investment of his or her account. Likewise, Section 404(c) does not set forth any rules regarding how and when participant direction must be granted. Rather, the regulations simply provide the conditions that must be met in order for a fiduciary to enjoy protection under Section 404(c) where participant direction is granted.

Greg Matthews, the editor of this newsletter, stated "There should be no DOL or ERISA [issue] as long as the participants were notified of the process. It is very likely that this process was the standard for that provider. We had several providers ... that imposed this restriction as being cost effective under the technologies that existed. Being cost effective would allow the provider to impose lower fees to the whole participant group. Back in 2001 the technologies ... just did not allow the daily deposit process we see today."

The position of the Department of Labor seems to be that if a plan offers participant direction, then the participant should have the opportunity to exercise that direction immediately, and failure to provide for immediate participant direction is a breach of fiduciary duty. Alternatively, the Department's position must be that the investment of plan assets in a money market account is a per se breach of fiduciary duty. Moreover, if the investment in the money market account is imprudent for elective deferrals would it not be equally imprudent for all plan assets? These questions simply point to the weakness of the DOL's position.

Plans that use this type of practice for handling elective deferrals should memorialize it in a formal written policy and communicate that policy to plan participants. Alternatively, plans may want to consider changing their practice to allow for immediate participant direction.

The most disturbing aspect of the Department of Labor's position on this issue is that it is being brought up in plan audits rather than in a proposed regulation. Because of the cost of fighting this type of audit, most employers are inclined to reach a compromise with the DOL as quickly as possible. Unfortunately, more than one employer has chosen to terminate a retirement plan after this type of experience.

Unfortunately, the type of dialogue that presently exists between the benefits community and the Internal Revenue Service does not exist between the benefits community and the Department of Labor. This issue should be addressed publicly with the Department of Labor as soon as possible. If the DOL is allowed to enforce this and similar positions that do not have a firm basis in the statute, the result will be more plan terminations.

Michael P. Coyne

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