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Are Your Employee Communications Up to Snuff? – ERISA Disclosure Practices

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Agenda

- Overview on Communication
- Compliance Requirements
- Content Considerations
- Methods of Providing Disclosures
- Traps for the Unwary
- General Best Practices and Recommendations

Overview

- Employee Communications come in a variety of sizes and forms
 - Some communications are provided because they are legally required
 - Other communications may not be “mandated” but make sense to provide for the protection of the company
 - Such as following up in writing with a participant after a call into the call center

Overview

- Employers sponsoring a benefit plan can be required to act in a dual capacity, both as the employer providing the plan as well as a fiduciary or steward to the plan
- It is critical to understand the perspective from which the communication is coming as some communications will be “fiduciary” in nature and some not
 - The fiduciary standard then applies such that the communication must be undertaken solely “in the interest of the participant and/or beneficiary”

Overview

- What are “employer” communications?
 - Certain functions, known as “settlor” functions, are the responsibility of the employer and are **not** fiduciary in nature.
 - An employer is communicating in its “employer” capacity when it communicates regarding:
 - A new benefit plan offering for employees
 - Changes to the benefit plan’s benefits and features
 - A decision to terminate the benefit plan offering

Overview

- What are “fiduciary” communications?
 - A person is acting in a “fiduciary” capacity when implementing the plan decisions made by the employer.
 - As noted above, plan fiduciaries must focus on performing each of these duties solely in the best interests of plan participants, not for the benefit of the employer.
 - A person is communicating in its “fiduciary” capacity when it communicates regarding:
 - The policies and procedures established for the benefit plan
 - The benefits of participation in the plan
 - The plan’s investment options, if any, and educating participants on the tools to help them save

Overview

- In a majority of ERISA lawsuits, the main issues come down to what was communicated and whether that communication provided participants with a “right” to something
- Therefore, as a general rule, understand what you are required to say, if anything, and then be thoughtful about how you say it

Compliance Requirements – First the Basics

- The Employee Retirement Income Security Act (ERISA) requires plan administrators (i.e., the people who run the employee benefit plans) to give plan participants in writing the most important facts they need to know about their retirement and health benefit plans including:
 - Plan rules
 - Financial information
 - Documents on the operation and management of the plan
 - Includes “any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute an instrument under which the plan is established or operated...” (Advisory Opinion 96-14A)

Compliance Requirements – First the Basics

- Documentation on the operation and management of the plan
 - Real life example of a participant request
 - A copy of the IRS application and determination letter for plan - **Reasonable**
 - The last ten (10) years of financial documents for the plan - **Reasonable**
 - The last ten (10) years of financial documents for the employer - **Overreaching**
 - Any and all financial documents regarding the funding of the plan - **Reasonable**
 - The composition, including names and contact information, for all pension related committees and boards - **Reasonable**
 - A statement detailing how the discount rate used in the lump sum calculation was determined with documents supporting the accuracy of said rate - **Reasonable**
 - A statement detailing the calculation using the interest rate for actuarial equivalents when calculating lump sum distribution - **Reasonable**

Compliance Requirements – First the Basics

- Some of this information must be provided to participants regularly and automatically by the plan administrator:
 - Summary Plan Description (SPD)
 - Summary of Material Modifications (SMM)
 - Summary Annual Report (SAR): Summary of annual financial position
 - Summary of Benefits and Coverage
 - Periodic Pension Benefit Statement
 - Fee Disclosure Information
 - Annual Notice and Disclosure Requirements
 - Benefit Claim Determinations

Compliance Requirements – First the Basics

- Others documents are available upon request, free-of-charge or for copying fees. These requests should be made in writing.
 - Plan documents
 - Trust documents
 - Collective bargaining agreements
 - Certain written policies and procedures

Compliance Requirements – First the Basics

- The DOL regularly updates and publishes the “Reporting and Disclosure Guide for Employee Benefit Plans” (the “Guide”)
 - <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf>
- The Guide provides a simplistic roadmap of:
 - The actual legally required document to be provided
 - The information required to be contained in the document
 - Who the document is disseminated to
 - When the document has to be provided
- The larger the number of ERISA benefit plans an employer has, the larger the number of employee communications required

Compliance Requirements – First the Basics

- In many instances, the DOL provides a model of the required communication
- What is the general ERISA standard for employee communications?
 - It must be written in a manner calculated to be understood by the average plan participant, and
 - It must be sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan
- And these are just the defined “technical” requirements

Compliance Requirements – First the Basics

- Keep in mind that “employee communications” are not only limited to the expressly defined communications in ERISA
- In many instances, you need to communicate one-on-one with participants regarding their specific benefits:
 - When someone retires and needs to commence their specific benefit
 - When someone terminates and needs to convert their insurance coverage (such as health to COBRA or life insurance to an individual policy)
 - When responding to a claim for benefits (which is quite fact specific)

Compliance Requirements – An Example

- Compliance with ERISA § 404(c)
 - ERISA § 404(c) which is designed to help retirement plan sponsors limit their fiduciary liability
 - However, the limitation of liability relies heavily on advising participants **in writing** of their responsibility to direct the investment of their accounts, and by providing them with sufficient information **in writing** to permit them to make informed investment decisions
 - If done correctly, the plan fiduciary may not be liable for any losses resulting from individual investment choices

Compliance Requirements – An Example...continued

- To take advantage of the fiduciary relief available under ERISA § 404(c) plan fiduciaries must satisfy certain conditions
 - The plan must offer at least three diversified investment alternatives (“core funds”) that have materially different risk and return characteristics so participants can diversify to minimize risk
 - The plan must permit transfers among these three core funds at least quarterly
 - **The plan must give participants enough information to permit informed decision-making.** The regulations are specific about what information must be given to participants automatically and upon request, including regular and periodic disclosures of plan-related and investment-related information
 - Participants must be given the opportunity to give investment instructions to an identified plan fiduciary who is obligated to comply with those instructions

Compliance Requirements – An Example...continued

- Our point is....this is ALL communication
- In this instance, the appropriate communication provides the employer an additional legal protection instead of simply satisfying a legal requirement

Content Considerations

- With legally-required documents:
 - Sometimes following the model language provided is safe and ensures you meet the ERISA legal compliance requirement
 - Sometime following the model language means the majority of participants have no idea what they are being told
- With more personalized employee communications which are participant specific:
 - We don't have “models” and need to pay particular attention to what we say and how we say it

Content Considerations

- In a February 2016 published survey by the International Foundation of Employee Benefit Plans (<https://www.ifebp.org/pdf/benefits-communication-survey-results.pdf>):
 - 89% of the employers who responded want their participants to understand and better use the benefits that are offered to them
 - However, only 28% of those same employer indicated that the put significant effort and resources behind improving the employee communications surrounding the benefit
 - 48% of those employers also believe participants do not understand the benefit communications
 - And 80% of those employer do not believe that participants even open or read the benefit communications

Content Considerations

- **The Challenge: Employers have a legal obligation to provide certain ERISA employee disclosures that they do not feel the employees read or understand** but they recognize that those communications are likely the only information explaining the plans and their benefits
 - Balancing providing ERISA mandated disclosures/information with providing information in a manner in which a participant can use and understand it

Content Considerations

- There is no magic bullet - think outside the box
- At the end of the day, retirement plans and health and welfare plans are just not that exciting to most people and the form and manner in which ERISA assumes information will be provided is no longer how individuals best receive communications
- So, if we need them to read something (especially a legally required document), figure out how to present it in a manner that grabs their attention or induces them to read on

Content Considerations

- Things to keep in mind:
 - Hit the main requirements of the ERISA disclosure
 - Be clear and concise – use bullet point remarks and short precise sentences
 - Provide context
 - Make it personal by using examples that apply to a large percentage of the population being addressed
 - Use humor, if possible
 - Make it as easy as possible for them to respond if a response is necessary (e.g., providing internet sites/links, check the box and easy return postcards)

Content Considerations

- Use multiple modes of communication
 - In writing
 - Face-to-face meeting
 - Larger format forums and meetings
- Recognize how participants best receive information and use as touch points
 - Social media
 - Provide materials electronically
 - Use “catchy” information to grab attention

Content Considerations

- How can an employer better communicate complex benefit plan information?
 - Recognize that communications may need to educate as well as provide plan information
 - Think of how the information can be summarized at the top for engagement purposes and “at-a-glance”, with the details provided lower down in the document
 - Occasionally the material is conducive to using analogies/examples which may make the concepts and importance of the information easier to understand
 - Formulaic ERISA disclosures (e.g., Annual Funding Notices) may not allow for this
 - Supplemental information (e.g., SMM) may allow more flexibility (e.g., explaining a formula change).
- Remember, in most instances, ERISA communications have specific information which must be communicated, but the DOL normally does not dictate how it is presented

Methods of Providing Disclosures

- As a general matter, employee communications are provided in writing (it is the proof of how the ERISA requirement was satisfied).
- Given advances in technology and the preference of a large majority of people to receive information electronically rather than via paper copies, it is important to outline the DOL requirement surrounding the electronic distribution of legally required employee communications.
- ERISA dictates the *minimum* that must be disclosed. Plan administrators may wish to provide additional information to allow for continued explanation of plan benefits.

Methods of Providing Disclosures

- **General Rule:** Electronic disclosure is permitted if the disclosure is undertaken using “measures reasonably calculated to ensure actual receipt of the material.”
- Normally, this standard is met if the DOL rules relating to (1) notice, (2) systems and (3) consent are properly followed.

Methods of Providing Disclosures

- Notice Requirement... **Website Distribution**
 - Website Distribution – can be used if the legally-required documentation on the website “permits current benefit statements to be provided on a continuous bases through a secure plan website for a participant/beneficiary who has access to the website.”
 - The plan sponsor would distribute a NOTICE that the required documents are available electronically. The notice must:
 - Be provided to each participant
 - Alert the recipient of the significance of the document
 - Alert the recipient as to how such information can be accessed
 - Apprise the participant/beneficiary of their right to request and obtain, free of charge, a paper version of the information provided

Methods of Providing Disclosures

- Notice Requirement... **Website Distribution**....continued
 - Notice must contain a prominent link that directs the participants/beneficiaries to the website with the legally required materials
 - The notice itself can be provided electronically (if requirements can be met) or in paper form

Methods of Providing Disclosures

- Notice Requirement... **Electronic Distribution of Actual Document**
 - The plan sponsor would send the document electronically with a cover email that:
 - Alerts the recipient of the significance of the document
 - Alerts the recipient as to how such information can be accessed
 - Apprises the participant/beneficiary of their right to request and obtain, free of charge, a paper version of the information provided

Methods of Providing Disclosures

- Systems Requirement... **Electronic Infrastructure Must Be Sufficient**
 - The plan administrator must take steps to ensure that the system used for electronically furnishing the information:
 - Is providing the Notice as described above under the Notice Requirements, AND
 - Results in actual receipt of the transmitted information
 - Steps for ensuring actual receipt
 - Automatic return/deliver receipt feature
 - Take corrective action if notified of non-receipt (i.e., mailing a paper copy)
 - Maintain records of who transmitted to and confirmation of receipt
 - Documents furnished on a website must be available on that website for a “reasonable period of time” after participants are notified of the documents availability
 - System must protect the confidentiality of any transmitted personal information

Methods of Providing Disclosures

- Consent Requirement... **Participants Whose Duties Require Accessing an Electronic Information System**
 - An affirmative advance consent to provide document electronically is not required if participant:
 - Has ability to access electronic information documents at any location where participant is “reasonably expected to perform his/her duties as an employee”
 - Has access to employer’s information system as an “integral part” of his/her duties as an employee
 - Must be able to request and receive a paper version of the document

Methods of Providing Disclosures

- Consent Requirement... **Participants Are NOT Active Employees or Who Do NOT Have Access to a Computer as Part of Their Regular Duties**
 - A communal portal or computer that is “available” is not sufficient
 - An affirmative advance consent to provide document electronically is required in these situations.
 - Consent may be in electronic or non-electronic form, but the individual must affirmatively consent in a manner that reasonably demonstrates that the individual may access the information in electronic form and has provided an email address for the receipt of such information.

Methods of Providing Disclosures

- Consent Requirement...**Participants Are NOT Active Employees or Who Do NOT Have Access to a Computer as Part of Their Regular Duties...**Continued
 - The advance consent notice must contain:
 - The types of documents to which the consent applies
 - An explanation that participant consent can be withdrawn at any time
 - The procedures for withdrawing consent
 - Explanation of the right to request and obtain a paper copy of the documentation
 - Any hardware or software requirements (such as a particular version of Windows) required to access and retain the documents electronically provided

Traps or the Unwary

- **TRIP-UP #1:** The most common problem in this area – Information in the SPD does not match and/or is inconsistent with the terms and conditions of the plan document
 - Slapping on the disclaimer that “to the extent the terms of the SPD are inconsistent with the terms of the plan, the plan wins” does not always work
 - A solid, thorough review of the SPD against the plan document is **always** time well spent
 - If your vendor prepares your SPD for you as one of the services AND you never review it, it does not absolve you of all liability
 - In fact, most service agreements outline that the plan and SPD are legal documents and it is the employers responsibility to ensure that they are accurate

Traps or the Unwary

- **TRIP-UP #1 (continuation):** Supplemental disclosures
 - As plan administrators provide “extra” disclosures (e.g., snap shot discussions of benefits, updates on social media, bullet points highlights....) it is important to maintain consistency with prior disclosures and plan documents
 - Inconsistent with plan disclaimers may not “fit” on short form disclosures
 - More communication provided, the more opportunity for errors
 - Casual communications require as much review as official ERISA disclosures
 - Consult with counsel and service providers to ensure consistency and appropriateness of the disclosure

Traps or the Unwary

- **TRIP-UP #2:** *Marin v. Dave & Buster's, Inc.*, S.D.N.Y., No. 1:15-cv-03608
 - Class action alleging that the company impermissibly reduced workers' hours to avoid ACA mandate
 - Alleged violation of ERISA Section 510 which prohibits employers and plan sponsors from interfering with an employee's attainment of benefits.
 - Plaintiff's provided numerous written statements from company management stating the need to reduce full-time staffing to limit financial exposure under ACA.
 - Sometimes full disclosure and transparency is the wrong messaging if it is violating another legal provision

Traps or the Unwary

- **TRIP-UP #3:** What is communicated to employees in a letter or other communication by the HR Department is not communicated or translated into a plan amendment within the Legal Department
 - New bonus program is communicated to increase eligible 401(k) compensation but it never included in the plan document
 - Eligibility for health and welfare coverage to a group previously excluded and the underlying plan and insurance contract is not correspondingly changed
 - These situations are quickly resolved by instituting an internal control which requires communication with the Legal Department before the employee communication is released

Traps or the Unwary

- **TRIP-UP #4:** Letters to participants, if prepared by a third-party administrator, should always be reviewed by an internal HR person for accuracy.
 - Misstated information based on wrong facts can cause the need for large settlements
 - Conversion of life insurance and applicable conversion date was stated wrong (date was further out than it should be), person died AFTER what should have been the correct conversion date but BEFORE the incorrectly stated conversion date. Since administrator communicated the end date incorrect, Court forced them to payout the benefit.
 - Participant incurred a break in service and was not allowed to re-enter pension plan. Third-party administrator missed the break in service and told participant repeated times during calls that she has 19 year of service instead of the four to which she was entitled.

Traps or the Unwary

- **TRIP-UP #5:** Failing to include required information on certain employee communications
 - Distribution election forms that fail to include all optional forms of benefits
 - Failing to tell a participant that they can commence their benefit at age 65 so that only an actuarial increase needs to be provided thereafter
 - Failure to provide official claims determination responses that include identification of participant's rights

Traps or the Unwary

- **TRIP-UP #6:** Failing to have an appropriate on-boarding or off-boarding process
 - New employee information packets should include information about benefits, including SPDs of such those plan in which an employee may begin to participate
 - Annual notices should be included in new employee information packets
 - Regular review and update of on-boarding materials will help ensure that new employees are not delayed in applying for benefits
 - Terminating employees should receive a current SPD or other description of plan benefits
 - To the extent a terminating/retiring employee received a current SPD upon separation from service, the requirements for updating information become simplified. Avoids bulk reprinting and mailing charges for “ex-employees” with benefits.

General Best Practices and Recommendations

- Timing is critical
 - Maintenance of a compliance calendar can assist plan administrators in monitoring and providing communications as appropriate
 - Certain notices are required for plan's operation in accordance with specific design features (e.g., safe harbor notices, QDIA notices)
 - Failure to provide notices can be costly (e.g., may have to fund additional contributions) and confusing to participants
 - ERISA requires certain pro forma information be provided at regular interviews (even if not annually) – SPD must be updated every 5 years (at a minimum)

General Best Practices and Recommendations

- Participant education may be required
 - Most participants lack financial literacy required to review certain plan information
 - Information alerting participants to the impact of appropriate investment and monitoring of investments may provide a better understanding of benefits
 - Participants are unfocused and uninterested in the terms of their benefit plans – providing succinct, high level information about plan benefits may give individuals a better understanding of their opportunities
 - Work with service providers to determine participant interaction with plan benefits (e.g., are participants reviewing their account information online?)

General Best Practices and Recommendations

- Reminders about routine benefit matters can assist in administration
 - Updates/maintain beneficiary(ies) selection
 - Submission of QDROs in the event of a family change
 - Maintenance of plan records
 - Claims determinations
 - QDRO acceptance
 - Review investment allocations and information as to where a participant may receive financial planning assistance (if available)

General Best Practices and Recommendations

- Continued review and updating of plan communications
 - Plan administrators should consider regular review of participant communications to ensure updated information does not need to be provided
 - SMM to be provided if benefits change prior to the next publication of the SPD
 - “Box” communications may need to be updated as regulatory requirements change or benefits are revised
 - Coordination between HR and Legal is important to ensure consistent and accurate messages

Questions?