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webcast

Plan Sponsor Basics

Webinar 4 of 6

Participant Disclosures and Communications for Retirement Plans

Presenters:

John G. Ferreira

Mark J. Simons

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www.morganlewis.com

Scope of Discussion

- This webinar reviews the disclosure requirements for single-employer tax-qualified plans that are subject to ERISA.
- Special rules apply to governmental and “non-electing” church plans.
- Special rules also apply to “top hat” nonqualified plans.

Participant Disclosure: Overview

- Here's what we will cover today:
  - Recurring disclosures
  - Event-driven disclosures
  - Electronic disclosure requirements
- For disclosures, we will cover (i) what the disclosures are and what plans they cover, (ii) who is responsible, (iii) what information must be included, and (iv) consequences of failure to comply.
- We can't get into great detail on all notices, but we will provide as much as time allows.

Participant Disclosure – Responsible Party

- It is important to understand who is responsible for (i) creating, (ii) reviewing, and (iii) providing the disclosure in order to avoid late notices or outright failure to provide notices.
- For example, in the case of a preapproved plan (prototype, volume submitter), the company that prepared the document might provide the disclosure, but outside counsel may be requested to review it, and in-house personnel may be responsible for distributing it.
- We recommend a detailed annual compliance checklist, including required filings and recurring disclosures, with responsible parties identified.

Recurring Disclosures – All Plans
SPDs

- A summary plan description (SPD) must be provided to all participants and to any beneficiary receiving benefits under the plan.
  - The SPD must be provided within 90 days after an employee becomes a participant, or 90 days after the beneficiary begins receiving benefits.
  - In plans with immediate eligibility (e.g., to make 401(k) deferrals), it generally should be provided upon hire.
  - In the case of a new plan, the SPD can be provided within 120 days after the establishment of the plan.

Recurring Disclosures – All Plans
SPDs

- The SPD is (as its name implies) a plain English summary of the plan document.
- Regulations of the U.S. Department of Labor (DOL) spell out what items of information have to be included in an SPD (DOL Reg. Sec. 2520.102-3(a)).
  - Important: Information regarding how benefits can be lost; claims and appeals procedure; ERISA-required information; ERISA rights language; reservation of right to amend or terminate
  - Can have different versions for subgroups of participants within the same plan (though all participants can request all versions)

Recurring Disclosures – All Plans
SPDs

- There is no automatic monetary penalty for failing to provide the SPD, or for providing it late.
  - If, however, the DOL audits the plan and discovers that the SPD was not provided, it will compel the plan sponsor to prepare an SPD, and to distribute it.
- If a participant requests an SPD, failure to provide a copy within 30 days could trigger a penalty of up to $100 a day for each day it is late.
- Willful violations could be subject to criminal penalties.

Recurring Disclosures – All Plans SPDs

- The SPD must be periodically supplemented with a "summary of material modification" (SMM) to reflect any changes to the plan.
- Therefore, any time the plan is amended, an SMM should be prepared if the amendment addresses something that is described in the SPD.
  - The SMM is due 210 days after the end of the plan year in which the related amendment was adopted.
  - Special rules require more rapid updating for certain health plan changes.

Recurring Disclosures – All Plans SPDs

- The SPD must be updated – completely rewritten – every five years if plan amendments were adopted in the interim that triggered an SMM requirement.
- If no such amendments were adopted, the SPD must be rewritten every 10 years.
  - The vast majority of SPDs should be rewritten every five years. Most will have intervening SMMs.

Recurring Disclosures – All Plans SPDs

- Sometimes the SPD inadvertently contradicts, or supplements, information provided in the plan.
- The U.S. Supreme Court recently held that the SPD is generally a mere plain English summary of the official plan document, and does not control for purposes of ERISA Section 502(a)(1)(B) (i.e., the right of participants to sue for their promised benefits). Amara v. Cigna, 131 S. Ct. 2900 (2011).
  - This is not always the case – some welfare plans use the SPD as the plan document.

Recurring Disclosures – All Plans
SPDs

- However, the Supreme Court did allow that participants could possibly sue for “equitable relief” under ERISA Section 502(a)(3) for actual harm caused by false or misleading communications.
- Other federal court cases have created “common law” communications duties under ERISA:
  - Can’t lie or intentionally mislead when discussing benefits (Varity)
  - Must disclose material information if asked or if fiduciary knows participant lacks such information (Curcio, Bixler, “serious consideration” cases)

Recurring Disclosures – All Plans
SPDs

- Takeaways:
  - Make sure you know what is in your SPD, and whether it accurately reflects the terms of the official plan document and your administrative practices.
  - If you use a preapproved plan, and thus a form SPD produced by a vendor, review it carefully – the forms are often produced by an automated program and mistakes sometimes happen.
  - Don't use the SPD to vary from or supplement the official plan terms – if you want to rely on something, make sure it's in the plan (e.g., limits on participants' rights regarding claims and appeals).

Recurring Disclosures – All Plans – Benefit Statements

- Plan administrators must periodically furnish benefit statements to participants. Failure to do so triggers a $110 per day per failure penalty.
- The frequency of the statements varies:
  - Participant-directed defined contribution plans
  - Non-participant-directed defined contribution plans
  - Defined benefit plans

Recurring Disclosures – Defined Contribution Plans – Benefit Statements

- Administrators of participant-directed defined contribution plans must provide a statement every calendar-year quarter.
  - This calendar-year quarterly schedule applies even if the plan has a non-calendar-year plan year.
- The statement for a defined contribution plan must be provided to participants, alternate payees, and any beneficiary with a right to a portion of a participant's account.
  - The actual due date is 45 days after the end of the quarter.
  - Statements must now include required disclosures regarding fees (more later).

Recurring Disclosures – Defined Contribution Plans – Benefit Statements

- Defined contribution plans that are not participant directed need only to provide a statement annually.
- The statement is due by the earlier of (i) the filing date of the Form 5500 for the related year, and (ii) the due date (with extensions) for the Form 5500.
  - The filing deadline of the Form 5500 depends on the plan's plan year.

Recurring Disclosures – Defined Benefit Plans – Benefit Statements

- The administrators of defined benefit plans are only required to provide a statement once every three years. The statement need only be provided to participants with an accrued benefit who are employed at the time the statement is furnished.
  - Alternatively, the administrator of a defined benefit plan can provide an annual notice to participants informing them of the availability of a benefit statement and how to obtain one.

Recurring Disclosures – Benefit Statements – Form of Disclosure

- Administrators can provide a hard copy of the statement, but can also do so electronically, if certain requirements are met.
- The DOL and IRS both have rules on how to provide notices electronically. The IRS rules are less difficult to satisfy, and can be used for benefit statements. These rules are discussed later in the presentation.

Recurring Disclosures – Statement to Terminees (All Plans)

- A benefit statement has to be provided to any participant who terminates employment or incurs a one-year break in service.
- This requirement is separate from, and in addition to, the ongoing benefit statement described in the prior slides.
- The benefit statement at termination generally needs to be provided only to terminated vested participants – there has been some informal DOL indication to the contrary, but no official authority.

Recurring Disclosures – Defined Contribution Plans – Fee Disclosures

- Effective August 30, 2012, administrators of participant-directed defined contribution plans must provide participants and beneficiaries at least annually with an extensive array of information regarding fees and expenses borne by participants and beneficiaries under the plan. DOL Reg. Sec. 2550.404a-5.
- First disclosure must be provided by August 30, 2012; annually thereafter.
- Actual fees charged must be disclosed on quarterly benefit statements (starting by November 14, 2012 for third quarter 2012).

Recurring Disclosures – Defined Contribution Plans – Fee Disclosures

- Failure to provide the information doesn't trigger a penalty or excise tax – the consequence is breach of fiduciary duty by the plan administrator and possible loss of "404(c)" protection (i.e., protection against liability for participant investment selections)

Recurring Disclosures – Defined Contribution Plans – Fee Disclosures

- If you haven't already done so, you should work with your recordkeeper now to confirm who will draft the disclosure, who will review it, and who will actually send it out.
- Most vendors have a standard form that they will not vary from – but you can likely supplement it or use your own form (at some expense).
- Special rules and complications apply if the plan allows investment in brokerage windows, company stock, or annuities.

Recurring Disclosures – Defined Contribution Plans – Fee Disclosures

- Typically, (i) the plan's recordkeeper will prepare the notice, (ii) the company or its outside counsel will review it, and (iii) the administrator or recordkeeper will be responsible for providing it.
  - Certain items of information covered by the fee disclosure requirements can be provided in the SPD or benefit statements if the rule's timing requirements are met. However, use of the SPD for this purpose generally is not recommended, unless the administrator is willing to reissue the SPD at least annually. (May work for SPD/prospectus combination that is updated annually.)

Recurring Disclosures – Defined Contribution Plans – Fee Disclosures

- The DOL recently issued “FAQs” regarding the notice. If you’ve already gone through the process of preparing and reviewing your notices, you may want to double-check them to ensure that they do not need to be changed or expanded to reflect the FAQs.
  - If you already sent the notices before the FAQs were issued, you are OK as long as you used a good-faith interpretation of prior guidance; you need not reissue the notices. You should still review for changes before the next notice is issued.

Recurring Disclosures – Defined Contribution Plans – SARs

- Administrators of defined contribution plans (not PBGC-covered defined benefit plans) must provide a summary of the annual report (SAR) (i.e., the Form 5500) to participants and to beneficiaries receiving benefits under the plans.
- The due date is the later of (i) nine months after the close of the plan year, or (ii) two months after the extended due date for the Form 5500, if an extension applies.

Recurring Disclosures – Defined Contribution Plans – Safe-Harbor Notice

- If a 401(k) plan is designed to be a “safe harbor” plan under Internal Revenue Code (IRC) Section 401(k)(12) or 401(k)(13), the administrator must provide a notice to all eligible employees at least 30 days, and no more than 90 days, before the beginning of the plan year.
- The notice must describe the major elements of the safe-harbor formula (e.g., the amount of matching contributions or nonelective contributions, withdrawal rights, the definition of compensation).
- Notice can be conditional if using nonelective contributions; must be followed up by definitive notice at least 30 days before end of year.

Recurring Disclosures – Defined Contribution Plans – Safe-Harbor Notice

- In the case of newly eligible employees, the notice must be provided no more than 90 days before the employee becomes eligible, and no later than the date he or she becomes eligible.
- If notice is not timely and properly provided, it would result in the loss of safe-harbor status and, thus, the need to do ADP/ACP testing for the year, even if the plan design otherwise satisfies the safe-harbor requirements.

Recurring Disclosures – Defined Contribution Plans – Safe-Harbor Notice

- The IRS generally prohibits employers from amending any aspect of the safe-harbor design once the plan year has started (the “no mid-year amendments” rule).
- However, a sponsor can suspend safe-harbor matching contributions mid-year if it meets certain requirements:
  - Participant notice, with change effective no sooner than 30 days after notice
  - Participants have reasonable opportunity to change their elections
  - Plan is amended to provide for ADP/ACP testing

Recurring Disclosures – Defined Contribution Plans – QDIA Notice

- In the case of participant-directed defined contribution plans that have a default investment option (a qualified default investment alternative, or QDIA), advance notice must be provided.
  - A participant or beneficiary typically is invested in a QDIA if (i) the plan has an auto-enrollment feature, (ii) he or she never made an initial investment election, or (iii) his or her initial investment choice was discontinued, and no subsequent election was made.

Recurring Disclosures – Defined Contribution Plans – QDIA Notice

- The notice must be provided at least 30 days in advance of:
  - the date of plan eligibility (for auto-enrolled participants); and
  - the date of the first QDIA investment (in other cases).
- Special timing rules apply to EACAs.
- In all cases, an annual notice must be subsequently provided at least 30 days in advance of each plan year.
- The QDIA notice can be combined with the safe-harbor 401(k) notice, if applicable.

Recurring Disclosures – Defined Contribution Plans – Auto-Enrollment Notice

- In the case of 401(k) plans that provide for automatic enrollment of eligible employees who do not affirmatively elect to defer or not defer, advance notice of the auto-enrollment feature must be provided.
  - There are various types of auto-enrollment plans (QACA, EACA, ACA), but the timing requirements for provision of the notice generally mirror the QDIA notice requirements (even if the plan doesn't use a QDIA).
  - The notice can be combined – as applicable – with the 401(k) safe-harbor and QDIA notice.

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Recurring Disclosures – Defined Benefit Plans – Annual Funding Notice

- The administrator of a PBGC-covered defined benefit plan must prepare and provide an annual notice describing the funding status of the plan. (This replaced the SAR.)
- The notice must be provided to participants, beneficiaries receiving benefits, unions with covered employees, and the PBGC.
- The deadline is 120 days after the end of the plan year.
- Notice discloses the "AFTAP" (funded percentage) as of the beginning of the prior year and certain other required information (e.g., regarding plan investments, PBGC guarantees).

Event-Triggered Disclosures – All Plans Distribution Package

- When participants receive a distribution, they must be provided certain information regarding the tax effect of the distribution, their right to roll it over, their right to defer receipt, the right of each participant's spouse to require that the distribution be made in the form of a spousal annuity, and certain other items of information.
  - The information package differs somewhat depending on whether the plan is a defined contribution or a defined benefit plan.

Event-Triggered Disclosures – All Plans Distribution Package

- The information generally must be provided at least 30 days, and no more than 180 days, before the distribution date.
- The plan administrator (or its delegate(s)) is responsible for providing this information.
- Failure to provide the information, or to obtain participant/spousal consent (as applicable), could technically lead to plan disqualification.

Event-Triggered Disclosures – All Plans Distribution Package

- Participants can waive the 30-day requirement if certain conditions are satisfied.
- If the package is given more than 180 days before the distribution date, it is “stale” and ineffective.
  - Note that a plan could be drafted to require fewer than 180 days. The rule is that distribution cannot be more than 180 days out – a shorter period of at least 30 days (e.g., 90 days) is allowed.

Event-Triggered Disclosures – All Plans Distribution Package

- A typical distribution package includes:
  - A statement of the benefit available to be distributed (including the value of normal annuity forms, if applicable)
  - An election form (for participant) – form of distribution; if lump-sum, whether cash or rollover
  - A spousal consent form (if applicable; must be signed by spouse and notarized or witnessed by plan rep)
  - Notice of the effects of the failure to defer
  - "402(f)" notice (tax notice)

Event-Triggered Disclosures – All Plans Notice to Interested Parties

- If a qualified plan is being submitted to the IRS for a determination letter, “interested parties” must receive notification of the filing 10-24 days in advance.
- Failure to provide this notice could undercut the validity of the determination letter (the IRS Forms 5300, 5307, and 5310 specifically require the applicant to state whether the notice was timely provided).

Event-Triggered Disclosures – Defined Contribution Plans – Blackout Notices

- Blackout notices must be provided to affected participants and beneficiaries of “participant-directed” plans (i.e., defined contribution plans that allow participants and beneficiaries to decide how to invest their plan money).
- The requirement applies if participants/beneficiaries will not be able to direct the investment of their accounts, or take loans or distributions, for more than three business days due to a temporary plan-imposed suspension, limitation, or restriction (triggered by such things as a change in recordkeepers).

Event-Triggered Disclosures – Defined Contribution Plans – Blackout Notices

- The notice must be provided to participants by the plan administrator no less than 30 days before the blackout period starts.
  - Exceptions: Where delay in blackout would be a fiduciary breach; unforeseeable circumstances beyond administrator's control; blackout relates to merger, acquisition, or divestiture
  - If the plan holds company stock, a copy of the notice must also be provided to the company.
- The DOL can charge up to $100 per participant per day for failure to provide the notice.

Event-Triggered Disclosures – "204(h)" Notice (DB/MPPP – Cutbacks)

- If benefits under a defined benefit plan or a money purchase pension plan are being cut back – for example, if the plan is being frozen – notice must be provided by the plan administrator 45 days in advance (15 days for small plans, and in conjunction with M&A events). ERISA Sec. 204(h); IRC Sec. 4980F.
- Affected participants and alternate payees must be notified, as must a union with covered participants.

Event-Triggered Disclosures – DB/MPPP – Cutbacks

- Failure to provide the notice triggers a $100 per participant per day excise tax; if egregious failure, **can nullify freeze (or if change in formula, give participants the greater of old and new benefits).**
- NOTE REGARDING MIDYEAR FREEZES: Already-accrued benefits can never be cut back. If an employer wants to freeze its defined benefit plan, it can only do so prospectively. If annual accruals depend on a condition that has already been met – for example, working 1,000 hours within the plan year – the freeze has to be delayed until the next plan year if the 1,000-hour requirement has already been met by one or more participants as of the proposed freeze date.

Event-Triggered Disclosures – Defined Benefits – Funding

- Administrators of defined benefit plans whose funded status under IRC Section 436 dips below 80% have to notify affected participants and beneficiaries within 30 days if the result is the imposition of certain specified benefit restrictions.
- Failure to do so triggers a $1,000 per day penalty.
  - The rules triggering this notice are complicated. Administrators generally should arrange with their actuaries to ensure that they will be notified well in advance concerning whether and when this disclosure requirement arises.

Event-Triggered Disclosures – Miscellaneous

- Mapping Notice
- Form 8955-SSA
- Missed Funding Notice
- QPSA Notice
- Plan Termination (PBGC-covered defined benefit plans)
- IRC Section 420 Notices
- QDRO Notice
- Requested Information
- Suspension of Benefits Notice

Electronic Disclosure

- Both the DOL and the IRS have rules regarding the use of electronic media to make participant and beneficiary disclosures.
- The DOL rules are more stringent – they allow use of electronic media without participant consent only if access to the employer's information system is an "integral part" of the employee's job. This leaves out employees for whom such access is not an integral part (as well as former employees and beneficiaries).

Electronic Disclosure – DOL

- Other active employees, and former employees/beneficiaries, must consent to electronic delivery.

Electronic Disclosure – IRS

- The IRS rules are more favorable – electronic disclosure is an option for any employee with a work email address (whether or not access to the employer's system is an "integral" part of his or her job).
- Other active employees, and former employees/beneficiaries, must consent to electronic delivery.

Electronic Disclosure – Benefit Statements

- The DOL has a special rule for the provision of a benefit statement. Specifically, the statement can be posted on a secure continuous-access website (such as an employer's intranet) for all participants and beneficiaries, as long as they receive prenotification of that disclosure approach.
- Special electronic delivery options also apply to the new participant fee-disclosure rules.

Electronic Delivery – Summary

- The DOL rules apply to:
  - SPDs
  - SMMs
  - SARs
  - QDIA notices (can also use IRS rules)
  - Benefit statements (can also use IRS rules, or secure continuous-access website)

Electronic Delivery – Summary

- The IRS rules apply to:
  - Safe-harbor 401(k) notice
  - QJSA/QPSA notice
  - 402(f) notice
  - QACA/EACA/ACA notice
  - 204(h) notice
  - Benefit statements (can also use DOL rules, or secure continuous-access website)

Questions?

Presenters

- John G. Ferreira, *Partner*
  - 412.560.3350
    - *jferreira@morganlewis.com*

- Mark J. Simons, *Of Counsel*
  - 215.963.5992
    - *msimons@morganlewis.com*

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