employee benefits update

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How rollovers to your plan can benefit everyone

High workforce mobility means that many employees leave a collection of "orphan" 401(k) plan balances in their wake. As a plan fiduciary, why should you care? Helping new employees roll over their accounts from former employers can be beneficial for both parties.

Dealing with orphans

One reason participants orphan their previous employers' plans is that the process of rolling over an old 401(k) plan balance to a new employer's plan can be cumbersome. Leaving a trail of orphan accounts may be the path of least resistance; however, many employees fail to properly manage their accounts even when they have only one plan to look after, let alone two or three former employer 401(k) accounts.

As for employers, small orphaned accounts add to plan administration costs, including the possibility of going over the threshold where an independent audit is required. To manage your 401(k) plan participant roster, you can roll accounts of terminated participants worth between $1,000 and $5,000 to an IRA in the participant's name. You'll need to perform due diligence in selecting an IRA provider, and you may be able to set up an automatic process.

For employers, small orphaned 401(k) accounts add to plan administration costs, including the possibility of going over the threshold where an independent audit is required.

If your plan doesn't roll over former participants' accounts to an outside IRA, what can be done? Consider advising former participants to consult with an independent investment advisor who can help them roll their balances into an IRA. Is this good for participants? Maybe. The overall fees that individuals pay on relatively small IRA accounts can be higher than those on accounts held in a 401(k) plan. Also, depending on the investments available to the participant on the rolled over funds, the former participant might be better off leaving funds in the investments available in the 401(k) plan.

Accepting rollovers into a plan

Even though a former employer might benefit from having smaller accounts rolled out of the plan after an employee's departure, the new employer can

IRS provides safe harbor examples for rollover eligibility

What standard are plan administrators held to when determining if a rollover into a 401(k) plan on behalf of a new employee is proper? IRS Revenue Ruling 2014-9 provided two safe harbor scenarios.

In the first, the employee received a distribution from the former plan's trustee in the form of a check written out to the employee's account in the new plan. To make sure the distribution was eligible for a rollover, the new plan's administrator checked the former plan's Form 5500 to determine if the former plan was a qualified plan.

In the second scenario, the facts were the same except that the source of the rollover was the new employee's IRA. The new employee certified that she was below age 70½ — the age at which she would have to begin receiving minimum distributions.

The revenue ruling addressed whether the administrator of the employee's new plan could reasonably rely on this evidence to determine that the checks were suitable for a rollover — even if they were misrepresentations. The IRS ruled that, without any evidence to the contrary, the answer is yes. But if the plan later determines that the rollover amount is an invalid rollover contribution, it must distribute the amount rolled over plus any attributable earnings to the employee within a reasonable time.

benefit from having dollars rolled into its 401(k). This is especially true for larger accounts.

Generally, the larger a 401(k) plan's total assets and participant head count, the greater its ability to negotiate competitive fees for plan services. In addition, an Investment Company Institute study identified another asset size-fee relationship: the larger the average participant account size, the lower the fees. This pattern is independent of the plan's overall size.

For example, the median "all-in" fee for small plans (with assets between $1 million and $10 million) was 1.29%, if the average account balance was $25,000. But the median all-in fee was 1.03% if average account sizes fell between $25,000 and $100,000. And they dropped to 0.96% for plans with average account sizes exceeding $100,000.

The study found the same pattern for plans with substantially more assets — plus, the all-in fees were much lower for all account size categories. For example, the median all-in fees for very large plans with aggregate assets exceeding $500 million were 0.43%, 0.39% and 0.29%, based on the same average account size groupings.

Doing the right thing

Reducing plan fees deducted from participant accounts even by a small percentage can have a significant impact on the value of the accounts at retirement. Encouraging your new employees to roll assets from their former employer's 401(k) plan into yours may improve employees' retirement preparedness. Lower administrative costs for the plan and increased savings for the participants can benefit both your company and its employees.

Upcoming compliance deadlines:

9/15 Extended deadline for corporate tax returns
9/15 Extended deadline for partnership tax returns
9/30 Summary Annual Report (SAR) due for Form 5500 that was due July 31, unless extension was granted (for returns extended to October 15, SAR deadline is December 15)

DOL reproposes ERISA fiduciary investment advice regulations

Most everyone in the employee benefits industry agrees: Protecting retirement plans and their participants from investment advisors who may focus more on their own financial interests than those of plan participants is a good idea. However, whether the Department of Labor's (DOL's) reproposed ERISA fiduciary investment advice regulations, if adopted essentially as proposed, will be able to do that isn't certain.

A little background

The DOL first issued proposed regulations in 2010 with the intent to broaden the scope of advisors included in the status of a fiduciary. The objective was to protect plan sponsors and participants from abuses by some advisors. The proposals were met with a barrage of industry criticism and were eventually dropped — until now. The 2015 reproposed regulations, although very similar to the original proposed regulations, shift their emphasis to IRAs as a primary focus.

Currently, the DOL is scheduled to hold public hearings on the proposals in August. If all goes according to the original schedule, the rules should be finalized in the fall and then take effect eight months later. However, because of anticipated criticism that the regulations' complexity and broad reach prevent compliance within this time span, the timetable may be extended.

There will no doubt be many comments on the reproposed regulations, some critical. However, because the reproposed regulations reflect feedback on the original proposals, substantive changes are unlikely to be made to the final regulations.

Proposed fiduciary definition

Currently, a five-part test determines fiduciary status for people providing investment advice, with a broad presumption of fiduciary status. The proposed rules replace this presumption with new "principles-based" prohibited transaction exemptions and change several existing prohibited transaction class exemptions.

Under the proposed regulations, a person is an investment advisor fiduciary if, for a fee, he or she provides investment recommendations directly to a:

- Plan,
- Plan fiduciary, plan participant or beneficiary, or
- IRA or IRA owner to purchase or sell investments, take a distribution, execute a rollover, or retain a particular investment manager.

A recommendation is a "communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the recipient engage in or refrain from a particular course of action."

Fiduciary "carve-outs"

The DOL provides exemptions to the above broad fiduciary rule through "carve-outs." For example, a person won't be considered a fiduciary for providing the following investment advice:

- Statements or recommendations made to a "large plan investor with financial expertise" by counterparties involved in an arm's length transaction or a swap or security-based swap that's regulated under the Securities Exchange Act or the Commodity Exchange Act,
- Statements or recommendations provided to an ERISA plan fiduciary by an employee of the plan sponsor if the employee receives no fee beyond his or her normal compensation,
- Marketing or making available a platform of investment alternatives to be selected by a plan fiduciary for an ERISA participant-directed individual account plan, and
- The identification of investment alternatives that meet objective criteria specified by an ERISA plan fiduciary or the provision of objective financial data to such fiduciary.

In addition, the rules carve out a fiduciary status exemption for providing information and materials that constitute investment or retirement education. However, the revised rule prohibits distribution of materials that discuss specific investment products, investment managers, or the value of particular securities or property. If the education includes asset allocation models, those models must be generic and cannot identify specific investments available to plan participants.

Concerns for sponsors

Although the DOL's reproposed regulations will govern the behavior of investment advisors and financial institutions that provide services to retirement plans and their participants, the rules affect plan sponsors as well, and not always positively. For example, critics argue that the rules will constrain the availability of investment services, particularly for smaller plans, by pushing their regulatory compliance costs unsustainably high.

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The DOL has responded to this criticism by stating that the current system in which firms can benefit from hidden fees found in the fine print of retirement investments with high costs and low returns isn't fair.

SEC gets in the mix

Meanwhile, the Securities and Exchange Commission is planning to propose a fiduciary standard for brokers who recommend investments, whether to individuals or retirement plan sponsors. It's unclear how those proposals will mesh with the DOL's proposed regulations. Either way, 2015 is shaping up to be a big year for investment-advice fiduciaries.

Are you insured?

FIDUCIARY LIABILITY INSURANCE CAN HELP WHEN PROBLEMS ARISE

One of the most contested areas of employee benefits litigation revolves around fiduciaries and their duties to plan participants and beneficiaries. If you're a fiduciary, the cost of defending yourself can be steep, regardless of fault. That's where fiduciary liability insurance fits in.

Who's involved?

ERISA defines a plan fiduciary as an individual who:

- Has discretionary authority or control with respect to plan management or disposition of plan assets,
- Renders investment advice for a fee, or
- Has discretionary authority or responsibility for the plan's administration.

According to research compiled by Travelers Indemnity Company, the average settlement in fiduciary breach litigation is $994,000 and the average cost of defending against a claim is $365,000. Making matters worse, 69% of "substantive" ERISA litigation resolves in the plaintiffs' favor.

You may think you've inoculated yourself from fiduciary liability by turning over the substantive decision-making authority for your benefit plans to financial institutions and specialized consultants. Think again. Even though it's possible to diminish exposure, it's generally not possible to remove yourself entirely from the line of fire.

Are you covered?

So what does fiduciary liability insurance cover? First, let's look at what it doesn't.

Some fiduciaries confuse fiduciary liability insurance with ERISA's fidelity bond requirement. These bonds protect the plan from dishonesty on a fiduciary's part, but don't protect fiduciaries from claims by others. Also, don't confuse fiduciary

liability coverage with employee benefit liability (EBL) insurance. While both policies cover administrative errors and omissions, EBL coverage doesn't cover clear ERISA violations.

Fiduciaries who also serve as a director or officer of the employer are most likely covered under the company's directors and officers (D&O) coverage. However, typically these policies don't cover incidents that happen when a person is acting in a fiduciary capacity. Finally, what if your company promises to indemnify you for losses incurred during your time as a fiduciary? That could be a risky proposition, depending on the company's financial position at the time of litigation.

What does fiduciary insurance cover?

Fiduciary insurance can cover both the fiduciary and the company sponsoring the plan. Categories you can choose to insure include:

- Faulty advice from counsel,
- Improper plan document amendments and disclosures to plan participants,
- Incorrect investment advice,
- Imprudent choice of outside service provider, and
- Negligent errors and omissions.

In shopping for fiduciary liability coverage, as with just about any other category of insurance protection, consider the carrier's financial strength. You can research this using ratings provided by services such as A.M. Best Company and Standard & Poor's.

Find out how long the provider has been offering fiduciary liability insurance and its track record for paying claims promptly. Finally, compare costs and remember that the least expensive policy may not always be the best.

Be on the safe side

If you're a plan sponsor or have fiduciary responsibilities, be on the safe side. Contact your benefits specialist to find out if you're covered under a fiduciary liability insurance plan.

Court finds that plan document trumps beneficiary designation forms

Plan documents generally control all aspects of a qualified retirement plan. Whether the plan document invalidates the language in other forms, such as a written beneficiary designation form, can lead to disagreement. Recently, the U.S. Court of Appeals for the Ninth Circuit had to resolve just such a case.

In *Becker v. Mays-Williams*, the plan participant designated his wife as his retirement plan beneficiary, but the couple later divorced. He then contacted the plan's benefits call center and telephonically undesignated his former spouse as the beneficiary and designated his son as the new beneficiary. However, he never filled out a written change of beneficiary form before he died.

Both the participant's former wife and son claimed to be the beneficiary. The plan administrator filed the suit in the federal court to determine the proper beneficiary, and the court ruled in the ex-wife's favor on the basis of the deceased plan participant's failure to complete a new written beneficiary form designating his son as the new beneficiary. The son appealed. The case turned on whether the beneficiary designation forms had the same legal authority as the retirement plan document.

The plan document stated that unmarried plan participants could change the beneficiary designation from time to time, and the summary plan description stated that this could be done by visiting the plan's website or calling the plan's benefits center. It also stated that, on the death of an unmarried participant, a valid beneficiary designation had to be on file with the benefits center prior to death, or the plan would disburse benefits to the participant's estate.

The court concluded that the beneficiary designation forms weren't themselves plan documents and that a written change of beneficiary form for unmarried participants wasn't required. Thus, the phone call designating the son as the beneficiary was proper, and the lower court's ruling was overturned. The lesson here: Make sure your plan document and any corresponding forms have matching language.

The solution for skyrocketing audit fees

Finding ways to cut costs while maintaining quality seems to be at the top of every executives to do list. As the person responsible for your organizations employee benefit plan audit, we can help you not only reduce your audit costs but also provide a higher level of service.

Pension auditors must sift through enormous amounts of financial data in accordance with the requirements of numerous laws, regulations and professional standards. If they don't know what they're doing, they can easily get lost in the numbers, run up large fees and fail to provide an accurate assessment of a plan's financial status.

Pension audit specialists

Insero & Company specializes in pension plan audits. Our professionals have extensive experience in this area and to ensure that our audits meet the highest standards of quality, our firm is a member of the American Institute of Certified Public Accountants (AICPA) Employee Benefit Plan Audit Quality Center and is registered with the Public Company Accounting Oversight Board (PCAOB).

Insero & Company is the independent registered public accounting firm for many companies that file a form 11-K with the Securities and Exchange Commission. We currently perform audits for more than 100 plans ranging in size from 100 to 60,000 participants, and from $1 million to more than $10 billion in assets.

Big firm capabilities, small firm attentiveness

As our many satisfied clients will testify, we offer the comprehensive benefit services of a large national firm, but at less cost and with a higher level of service. With close to 100 accountants, professional consultants and support staff, our firm is large enough to bring robust resources to bear on almost every client need, yet small enough to provide the personal attention and relationship-based service that is important to our clients.

The culture of Insero & Company is hands-on and proactive, shaped by the old-fashioned notion of doing what is in the best interest of the client. In addition to pension and corporate audits, we provide a full range of tax, accounting and consulting services, including internal audit/Sarbanes-Oxley services, outsourced accounting and wealth management.

Go with the experts

We would welcome the opportunity to discuss your audit or other needs and put our expertise to work for you. Please contact Vince Leo at 585-697-9683 or Mike Giess at 585-697-9639 and let us know how we can be of service.

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