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Banyan Consulting is pleased to present our monthly newsletter. We hope the articles in this and future editions will provide insight into an array of employee benefits topics.

We appreciate your feedback! If you have a topic for future discussion, please let us know.

DOL Proposes to Expand Who Would Be Considered a Plan Fiduciary When Rendering Investment Advice

More of the individuals associated with 401(k) plan investment services would be considered fiduciaries, under an expansion of the ERISA fiduciary definition proposed by the Department of Labor. The proposal recognizes changes to the retirement plan landscape-in particular, the growth of defined contribution and 401(k) plans into the predominant form of retirement plan-along with the accompanying emergence of an industry that provides investment services to these plans, and their participants.

According to the DOL, "The proposal amends a 35-year old rule that may inappropriately limit the types of investment advice relationships that give rise to fiduciary duties on the part of the investment advisor. The proposed rule takes account of significant changes in both the financial industry and the expectations of plan officials and participants who receive investment advice; it is designed to protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA's fiduciary standards."

Being amended are regulations issued in 1975 that created a five-part test for determining when the offering of investment advice gave rise to fiduciary status. This test had provided, that in order to be considered a fiduciary as a result of providing investment advice, the adviser must:

- Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property,
- On a regular basis,
- Pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, that
- The advice will serve as a primary basis of investment decisions with respect to plan assets, and that
- The advice will be individualized based on the particular needs of the plan.

Under the DOL proposal, an individual would be considered a fiduciary under ERISA if any one of the following applies:

- The person represents or acknowledges to be acting as an ERISA fiduciary.
- The person is an investment advisor under Section 202(a)(11) of the Investment Advisors Act of 1940.
- The person provides advice, appraisals or fairness opinions concerning the value of securities or other property; recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; or advice or recommendations as to the management of securities or other property. DOL commentary on this particular provision indicates that it intends to establish fiduciary status for activities like the valuation of closely held employer securities in ESOP transactions or the valuation of real estate being considered for purchase by a plan.
- The person provides advice or makes recommendations pursuant to an agreement, arrangement or understanding, written or otherwise, that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, a participant or a beneficiary. While some of this proposed language remains similar to the old five-part test, there are notable differences-
 - There is no requirement that the advice be provided on a regular basis.
 - There is no requirement of a mutual understanding that the advice will serve as the primary basis for the investment decision.

The proposal specifies limitations and exceptions to the new fiduciary definition proposal. Notably, with respect to individual account plans, such as 401(k) plans, the proposal excludes providing investment education information and materials. Fiduciary status also would not be triggered by the marketing or making available of a fund platform or menu of investment alternatives along with general financial information to assist in selecting and monitoring those investments, so long as this is accompanied by a written disclosure that the person taking such actions is not intending to provide impartial investment advice.

These changes, if approved, will mean that more individuals-such as consultants and brokers who provide investment-related advice to plans and participants-may be considered plan fiduciaries, and thus be held to the highest standard, to ensure that the advice they provide is in the client's best interest, regardless of their own personal or professional interests.

Avoid Costly and Common Mistakes with an Annual Review of Plan Administration Basics

Once annual enrollment has come and gone, it's a good time to brush up on some basic benefit plan requirements, to avoid some of the common mistakes made in employee benefit plan administration. The following list of potential errors is by no means exhaustive, but represents a sampling of issues to steer clear of:

- Keep your plan documents up to date and reference them in related plan communications. ERISA requires that all employee benefit plans be maintained pursuant to a written plan document. As the governing document for the plan, it should be reviewed on a regular basis, and amended if necessary, to keep up with new laws and regulations (such as health care reform). Since this will be the most detailed document regarding any given plan, it should be referenced in disclaimer materials included in less formal plan communications (such as annual enrollment materials) as the document that will control in the event of discrepancies, or errors or omissions in these other ancillary communications.
- Keep SPDs up to date and distribute them to employees. ERISA requires that employees receive a summary plan description (SPD) covering each benefit plan, and specifies the information that must be included in the SPD. Plan vendors may supply booklets or other communications materials to distribute to employees that describe the plan, but these are unlikely to meet the requirements for an SPD. When plan changes result in an SPD needing modification, an employer may distribute a summary of material modifications in the interim before preparing an updated SPD.
- Include only eligible employees (and dependents) in your plans, as to do otherwise will run contrary to plan documents and represent unnecessary coverage costs for your company. Improperly covering ineligible individuals—contractors, leased employees, former employees, etc.—can be a costly proposition. Similarly, maintaining formerly eligible dependents who, for example, have aged out of the plan, unnecessarily adds to plan costs. Eligibility audits can help to mitigate this problem.
- Follow plan terms in administrative practices. The plan document governs, and both internal staff and outside administrators must follow the terms of the plan when making eligibility and claims decisions, issuing plan notices, handling appeals, etc.
- Make sure plan contributions are properly calculated. This includes taking into account the definition of compensation that is in the plan (which may include bonuses, commissions, etc.) and correctly calculating matching and profit sharing contributions.
- If you allow employees to pay for any benefits on a pretax basis, a cafeteria plan is required. While the term "cafeteria plan" may conjure up images of employees selecting from a menu of benefit choices, a cafeteria plan is, at its most basic level, a premium only plan, and is required to be adopted before employees can pay their health (or dental, vision, etc.) plan premiums with before-tax dollars, or to make before-tax contributions to a health care or dependent care flexible spending account.
- If employees make salary deferrals to a 401(k) plan, these deferrals must be deposited into the plan trust on a timely basis, as by DOL regulation they become plan assets as soon as they can be reasonably segregated from the employer's general assets.

- Review your COBRA administrative practices to make sure all individuals qualified to elect COBRA coverage receive the proper notices, for all plans subject to COBRA (the health plan, but also the dental and vision plan, and the health care flexible spending account).

Administrative errors can result in fines and penalties, lawsuits, and employee discontent. An annual plan self-review can avoid these potential costly consequences of common mistakes.

Social Media Policy Violates National Labor Relations Act

The National Labor Relations Board (NLRB) recently sued employer American Medical Response (AMR) alleging that the company unlawfully terminated an employee for comments she posted on her Facebook® page about a supervisor. NLRB alleged that the termination was illegal because the employee's comments were "protected concerted activity" under the National Labor Relations Act and that AMR's social media policy was overbroad, resulting in a violation of the employee's rights under the Act.

AMR terminated the employee for violating the company's social media policy, which prohibits employees from making criticizing remarks about the company and other employees on the Internet. The policy also prohibits employees from discussing the company in any way on the Internet without prior permission.

NLRB officials state that complaints about supervisors or working conditions made by employees on social media outlets will almost always constitute "protected concerted activity" if other employees have access to view the information. A hearing for the case is scheduled for early 2011.

As the case could set a precedent for social media policies nationwide, employers should consider reviewing their own social media and Internet usage policies to ensure that they are not overbroad, and use caution when terminating employees for their use of social media. When crafting your social media policy, consider the following:

- Mention that the company provides employees with Internet access to be used as a business tool, and it must be used properly.
- Inform employees that they must comply with the company's conduct standards and policies on all Internet outlets regarding workplace retaliation, harassment and discrimination.
- Inform employees that they must comply with company policy on all Internet outlets by not disseminating any confidential or proprietary information relating to the company, its employees or its clients.

Inform employees that failure to comply with any of the company's policies, including the social media policy, may result in disciplinary action up to and including termination of employment.

Banyan Holding Prom Dress Drive During the Month of February

Banyan Consulting is holding a Prom Dress Drive during the month of February 2011 to support local high school girls in need. These new and gently used prom and special occasion dresses will be donated to Project Prom in Pittsburgh, PA and the Cinderella Project of Central PA prior to the 2011 prom season. Both organizations provide free dresses to girls in need.

Please consider donating a dress and accessories to Banyan's dress drive. Even though prom is considered an important rite of passage by many high school students, not everyone is in a position to be able to spend a significant amount of money to purchase a prom dress. By donating dresses you no longer wear, you will make it possible for a girl who doesn't have the financial means to purchase a new dress.

Ideal donations include:

- Long, currently styled gowns in great condition (no older than 5 years)
- ALL sizes and colors
- Dresses must be dry cleaned and on hangers

Both Project Prom and Cinderella Project are also accepting:

- Shoulder Wraps/Shawls
- Formal Jewelry/Tiaras
- Formal Handbags/Purses

Donations will be accepted at both Banyan locations during the month of February 2011:

- 20 Stanwix Street, Suite 401, Pittsburgh PA 15222
- 1215 Manor Drive, Suite 200, Mechanicsburg PA 17055

Please feel free to contact Jen Craven at (717) 796-7458 or jcraven@banyan-llc.com with any questions about the drive or how to donate.