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Is a Department of Labor Investigation in Your Future?

The United States Department of Labor (DOL) is responsible for investigating violations of ERISA's fiduciary, reporting, and disclosure requirements. The DOL conducts investigations of fiduciaries and service providers to ensure that they operate plans in the participants' best interests. In addition to requiring that violations are corrected, the DOL has the authority to levy penalties and fines in appropriate cases.

Recent events suggest that the number of DOL plan investigations and penalties will increase. The first is the recession. Whenever the stock market retreats and plan accounts go down, participants contact the DOL to complain about their plans. A sizable percentage of DOL plan investigations begin based upon these phone calls.

Certain complaints may generate greater scrutiny by DOL. For example, if participants have difficulty obtaining routine documents from employers, such as participant statements or summary plan descriptions, then DOL's concern is heightened. If there is a problem with late contribution of employee deferrals, DOL is apt to investigate as this is one of their "hot button" issues. This is especially true if the participant is also describing other financial problems that the employer is experiencing. If participants have difficulty obtaining statements that previously were readily available, the DOL becomes concerned that participant contributions may be delinquent or missing or worse, that contributions have been used by the employer to keep the business afloat.

Generally, plan sponsors must forward contributions withheld from the employee's pay to fund the plan as soon as these contributions can be reasonably segregated, but no later than the 15th business

Hot Subjects

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FAQ's

Participant Terminations

Most 401(k) plans allow hardship distributions only upon satisfaction of the safe harbor rules. If you are regularly receiving requests for hardship distributions that cannot be granted under the safe harbor rules, it may be appropriate to consider the use of other standards that may be more helpful to your employees.

What are my responsibilities when a participant

day of the month following the month in which such amounts would otherwise have been payable to the participant in cash. DOL recently finalized a safe harbor rule allowing plans with fewer than 100 participants to forward contributions within seven business days of withholding. They recently announced increased criminal enforcement where there are repeated and substantial delinquent contributions.

Increased DOL Staff

The recent financial crisis has highlighted the need for additional complex examinations and more investigators. The proposed budget for 2010 reflects an increase of approximately 75 positions for plan investigators.

Increased Availability of Plan Operational Data

Recent government action will result in the increase of plan data that may be used a part of any plan investigation. Increased fee disclosure in the annual report (Form 5500) required to be filed for large plans (over 100 participants) for 2009 and beyond may trigger increased scrutiny where DOL perceives excessive fees are being charged.

Another administrative change is that the DOL and the Securities and Exchange Commission (SEC) signed an agreement in July 2009 to facilitate the exchange of information on matters of mutual interest. Spurred in part by the growing scrutiny of retirement target-date investment funds, this collaborative agreement increases the potential that, if DOL investigates a company for delayed contributions, it could request SEC data that might shed light on additional infractions.

Red Flags

Plans with the one or more of the following characteristics may be more likely to be examined:

- unreasonably low rate of return on contributions
- untimely contributions
- insufficient rents paid for property or insufficient interest paid on loans,
- loan or lease defaults
- plans with a large percentage of assets in illiquid assets such as real estate, or limited partnerships
- unreasonably high administrative expenses
- noncash contributions
- non-exempt transactions with a party in interest, such as the employer or an owner.

terminates employment with assets in the plan?

In recent years, a trend in participant education has changed from enrollment and contributions to giving more advice to job changers and retirees. Now, plan sponsors can and should explain the tax implications of taking a cash distribution in the form of a lump sum, as well as alternative options.

Testimonial Corner

We'd love to hear about a positive experience you have had with our staff. Please take a moment to tell us about your experience. To share your story [CLICK HERE!](#)

Upcoming Classes

At BCG, we want to be your training headquarters for your retirement plan needs! We are in the process of creating online training sessions and want to hear your thoughts. We value your suggestions.

What are some topics that you would like to know more about? To share your class subjects---[CLICK HERE!](#)

Retirement Plan Hotlines

If you need to speak with the following service

Proactive Resolution

If plan officials discover a violation before the DOL, they can use the Voluntary Fiduciary Correction Program (VFCP) or Delinquent Filer Voluntary Compliance Program (DFVCP), which provide significant incentives to self-correct. The VFCP allows plan officials to disclose and correct 19 types of violations without a penalty. DOL issues a "no action" letter to the applicant, which avoids a civil investigation and penalty assessment. Using the VFCP, plan officials can assess if their plan is vulnerable before the DOL initiates an investigation.

One of the most important actions a plan sponsor can take is to perform a fiduciary assessment. The person performing the assessment should be well-versed in ERISA's fiduciary mandates and DOL's investigations. The fiduciary assessment involves reviewing form 5500 and the accountant's opinion, including footnotes for the past several years, especially schedules G, H, and I. Next, plan officials should investigate if the plan performed any of the 19 issues listed in the VFCP. If officials discover violations, they should make corrections and apply to the Program.

More DOL investigators, coupled with an increase in participants' complaints, signal consequences for plan officials that could be critical. Contact your Plan Account Manager if you wish to learn more about having BCG conduct a fiduciary assessment of your plan.



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Plan Account Management
Option 5

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Option 3

Participant Service
Representative
Option 4

