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LABOR AND EMPLOYMENT

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Summer is a busy time of year in the employee benefits area. Significant compliance deadlines must be met, and fiduciary issues remain hot. Here are five points that should not be forgotten with the summer heat.

1. Service providers must furnish fee disclosures to defined benefit and defined contribution plans by July 1, 2012

In accordance with final regulations under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), which were released by the U.S. Department of Labor ("DOL"), covered service providers of defined benefit and defined contribution plans must furnish fee disclosures to plan fiduciaries no later than ***July 1, 2012***. Under the new rules, service providers (for example, investment advisers and brokerage firms) must disclose to plan fiduciaries (including employer plan sponsors and plan administrators) certain direct and indirect compensation of $1,000 or more that they receive in connection with services provided to a plan.

Once the plan fiduciaries receive the disclosures, they must evaluate the reasonableness of the compensation paid for necessary services and identify potential conflicts of interest on a timely basis in order to avoid a prohibited transaction and resulting penalties. The disclosure requirements do not apply to individual retirement accounts, individual retirement annuities, simplified employee pension plans, simple retirement accounts, or welfare benefit plans.

The disclosures must include such information as descriptions of all the services provided and compensation that will be received in connection with the services, including compensation in connection with the termination of a service agreement and any "related

parties" compensation. As the disclosure requirements are detailed and specific, employers should coordinate with their service providers to ensure that all the required information is furnished to plan fiduciaries by **July 1, 2012**, and should establish a process through which the disclosures can be reviewed.

2. Employers must distribute participant-level disclosures for their defined contribution plans by August 30, 2012

In addition to the service provider fee disclosures, there are also new participant-level disclosures that plan fiduciaries of individual account plans, such as 401(k) plans, are required to provide to participants under Section 404(a) of ERISA. The first participant-level disclosures must be given to participants and beneficiaries by ***August 30, 2012***, and annually after that. In addition, the first quarterly statement disclosing plan-related expenses that are actually charged to individual accounts must be distributed by ***November 14, 2012***, and each quarter after that.

The disclosures must include detailed plan-related and investment-related information and be distributed to each participant and beneficiary. The plan-related disclosures include general plan information, as well as information on administrative and individual expenses. Actual expenses charged to individual accounts must be provided in a quarterly statement. The investment-related disclosures must be supplied in a chart or similar format; for each "designated investment alternative," identifying information, performance data, benchmarks, and fee and expense information must be included. In addition, the plan administrator must furnish a website address that gives participants and beneficiaries specific additional information on the designated investment alternative, as well as a glossary of investment and financial terms.

Although many employers and plan fiduciaries will rely on third-party administrators or investment providers to supply the required participant-level disclosures, the duty to make the disclosures remains with the plan and its fiduciaries. Accordingly, plan fiduciaries should establish procedures for assessing the completeness of any third-party's disclosures and ensure the timely distribution of the disclosures to participants prior to the initial deadline of **August 30, 2012**.

3. Summary of Benefits and Coverage must be issued for open enrollments starting on or after September 23, 2012

The first "Summary of Benefits and Coverage" ("SBC") – a requirement of the Patient Protection and Affordable Care Act or "health reform law" – must be furnished to participants in group health plans no later than the first day of the first open enrollment period that begins on or after ***September 23, 2012***. Employers should be mindful that the SBC must be given to participants when they are shopping for new coverage, when they are renewing their existing coverage, when there are any significant changes in coverage, and at any time upon request.

The SBC must:

- be no longer than four double-sided pages in 12-point font and prepared in "plain English" to help consumers understand the differences in various health plan benefits and coverage when seeking a new plan
- provide a summary of the key features of the plan, such as covered benefits, cost-sharing provisions, and coverage limitations and exceptions
- include coverage examples illustrating what proportion of the cost of care a plan will

cover for common medical conditions
- supply a Uniform Glossary with a list of definitions for key terms commonly used in health insurance coverage

For insured plans, the insurance carrier is responsible for providing the SBC, and, for self-funded plans, the plan administrator is responsible for the task. Given the level of detail required for the SBC, many plans are enlisting the help of third-party service providers to prepare the document. The SBC may be furnished either in paper form or electronically by posting it on a website or by email, as long as certain requirements are met.

It is clear that the SBC may not be substituted by a Summary of Plan Description or other plan documents. With the level of detail required in an SBC, plan administrators should ensure that processes are in place NOW for the drafting and distribution of the SBC in a timely manner.

4. Plan fiduciaries are held liable for violation of fiduciary duties in *Tussey* case

In *Tussey v. ABB, Inc.,* No. 2:06-CV-04305-NKL 2012 WL 1113291 (W.D. Mo., March 31, 2012) ("*Tussey*"), the U.S. District Court for the Western District of Missouri held that plan fiduciaries of 401(k) plans had violated their fiduciary duties, resulting in the court awarding a total of approximately ***$37 million*** to plan participants. Specifically, the court held ABB, Inc., and its retirement benefits committees ("ABB") responsible for failing to properly monitor the revenue sharing arrangements with Fidelity, the plan's record-keeper. Although the investment policy statement required that service costs be reduced through the use of rebates, the court found that ABB failed to inquire about rebates or assess the reasonableness of Fidelity's fees.

In light of the holding in the *Tussey* case, plan fiduciaries are reminded of their duty to clearly understand the terms of revenue sharing arrangements applicable to their bundled 401(k) plans as well as to diligently monitor the reasonableness of compensation paid to service providers. Plan fiduciaries should also review plan documents, especially investment policy statements, and assess whether decisions are consistent with those documents.

5. Employers must be aware of what it means to be a fiduciary

One of the most important and controversial topics in the realm of employee benefits in the past year has been the definition of a "fiduciary." The term has caught the attention of everyone involved in the world of retirement plans, especially as the DOL has taken on the task of broadening the definition of "fiduciary" under ERISA.

A fiduciary in the context of retirement plans (such as 401(k) plans) is any person who exercises his or her own judgment or discretion in administering or managing a plan, or who has control over plan assets. Fiduciaries generally include the plan's trustee, investment advisers, plan administrative or investment committee members, and those who select committee members. Also, fiduciaries may include the company and its officers and board of directors. Whether or not an individual is a fiduciary depends not on the person's title but on the functions performed on behalf of the plan.

Because of the increased emphasis placed by the DOL on who is a fiduciary and the personal liability attached to fiduciary duties, retirement plan decision-makers should confirm that best practices in plan governance are in place. Best practices would include, among other things, the establishment of committees (e.g., investment committees or

administrative committees) composed of members with relevant skills willing to devote the necessary time to plan oversight. The committees should receive training on roles and responsibilities, hold meetings regularly, distribute meeting agendas in advance, and document decisions in minutes and resolutions.

Plan fiduciaries should keep current with new guidance issued by the DOL on fiduciary duties and exercise their duties carefully and in accordance with applicable law and controlling plan documents.

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