

DEPARTMENT OF LABOR ISSUES GUIDANCE ON ELECTRONIC FEE DISCLOSURES

With the May 31, 2012 deadline for fiduciaries to disclose detailed plan fee information approaching, the Department of Labor issued Technical Release 2011-3 on September 13, 2011. This release provides temporary guidance concerning the use of electronic media for satisfying the fee disclosure requirements. The release was in response to numerous requests from employers and the employee benefits community for guidance so that paper communications can be minimized. It permits electronic communications under two sets of conditions, depending upon whether the employee regularly accesses electronic media at work. For fee disclosures that are not part of pension benefit statements, employers may satisfy the disclosure requirement electronically for employees who regularly access electronic media at their work place or who have affirmatively approved receiving the disclosures electronically. In addition, employers who have email addresses for participants who have had electronic interaction with the plan in the past 12 months; but who have not affirmatively approved, may provide electronic disclosure provided they follow specific DOL prescribed disclosures and procedures. This is accomplished by sending an initial notice to these participants that provides:

- A description of the information to be furnished electronically
- Receiving electronic communication is voluntary on the part of the participant and the participant has the right to receive a paper copy of the disclosures
- The participant has the right to opt out of receiving electronic notices at any time
- Gives the procedure to follow in order to update an email address or opt out of electronic notices

The initial notice must be provided between 90 and 30 days before the date the first disclosures are required (February through April 2012 for calendar year plans). Those who receive the initial employer notice who neither affirmatively elect to receive electronic disclosures nor elect to receive paper notices, may continue to receive annual notices thereafter. The recurring annual notices must contain basically the same information as the initial notice and the participant must have had electronic interaction with the plan within the past 12 months.

The DOL emphasizes that the above rules are temporary and employers may rely on them until more formal guidance is provided. There are likely to be further discussions of electronic delivery issues as the DOL refines the rules based on feedback from employers and participants. NRS, along with the Plan's Investment Provider, will assist clients in understanding and complying with these rules.

APPEALS COURT TO RETIREMENT PLAN ADMINISTRATORS: DON'T OUTTHINK YOURSELF

The Fifth Circuit Court of Appeals recently rendered an opinion (*Brown v. Continental Airlines, Inc*) concerning a retirement plan administrator who may have examined the available facts a little too closely. The case involved Qualified Domestic Relations Orders ("QDRO") for nine Continental Airlines pilots. All of the pilots involved were actively employed by Continental and were participants in Continental's pension plan. The pension plan does not allow actively working participants the right to take a current single sum benefit. However, single sum payments are permitted to the extent required by a QDRO. All nine of the pilots divorced their wives and presented the Plan Administrator (Continental Airlines) with a QDRO directing that the plan pay single sum benefits to the pilot's ex-wives.

Arguing that the nine divorces were fraudulent because all of the wives continued living with their husbands and all remarried their pilot husbands after receiving the pension money, Continental sued for restitution of benefits. The decision is seen as good news for employers who administer retirement plans. Both the District Court and the Appeals Court that granted the pilots' motion to dismiss the suit concluded that ERISA does not authorize an administrator to consider or investigate the intentions or good faith underlying a divorce decree. This decision permits a plan administrator to simply follow the terms of his or her plan document and the terms of the QDRO. A Domestic Relations Order can be taken at face value when a Plan Administrator decides whether it is a Qualified Domestic Relations Order and need not be concerned with underlying motives or intent. Keep it simple...

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“TIMELY MAILED IS TIMELY FILED” – IRS TO ALLOW PRIVATE DELIVERY SERVICE POSTMARKS

For a number of years, delivering a document to the IRS with a filing deadline was accomplished by using United States Postal Service registered or certified mail and relying on the date of the postmark as the delivery date. This “postmark rule” continues to apply, except that final regulations issued in August of this year open the door for the use of private delivery services in addition to the USPS. According to the regulation, private delivery services that satisfy yet to be specified conditions and procedures may be used in lieu of the U.S. Postal Service. This development should make the job of timely filing a paper document easier than in the past. These rules, of course, are made obsolete in cases where delivery is accomplished by electronic means.