FAVORABLE TRENDS FOR 401(K) PLANS

Recently released statistics for 2011 illustrate some positive trends with respect to 401(k) plans. For example, plans that included employer matching of employee deferrals rose from 68% in 2010 to 73% in 2011. This continues a rebound that started in 2010, after the percentage matching dropped to 67% in 2009 from a 2005 peak of 73%. Not surprisingly, the percentage of plans offering 401(k) advice rose to 83%. This compares with only 42% offering such advice in 2005. Automatic enrollment of participants continued a steady upward trend, reaching 42% in 2011, compared to 5% in 2005. In what we find to be a surprising statistic, four out of ten plans that feature automatic enrollment also feature automatic escalation of the default deferral percentage as automatically enrolled participants remain in the plan. These trends underscore the increased importance of 401(k) plans in providing economic security during retirement.

MORE INFORMATION ON PARTICIPANT DIRECTED INVESTMENT DISCLOSURES

Most employers (and their advisors) who sponsor retirement plans featuring participant investment direction have probably heaved a sigh of relief, after providing mandated participant disclosures by the August 30, 2012 deadline. The August 30 deadline applied unless the plan year began between July 2, 2012 and October 31, 2012, in which case it is 60 days after the first day of the plan year. Certainly, collection and preparation of data for the annual disclosure is a big part of compliance requirements. However, for a great many of these plan sponsors, more activity will be required before the next round of annual disclosures come around. Applicable regulations make it clear that any mid-year changes must be disclosed to all involved at least 30 days, and no more than 90 days, before the particular change is effective. This includes any and all of the following: (a) investment instruction procedures and limitations on investment instructions, (b) voting, tender and similar rights, (c) designated investment alternatives, (d) designated investment managers, (e) “brokerage windows” or self directed brokerage accounts, and (f) fees and expenses charged against the plan and the basis for allocating these amounts to participants. In the event of unforeseeable circumstances beyond the employer’s control, the change must be described as soon as reasonably practicable.

Fortunately, there is no requirement to repeat the entire annual disclosure to participants due to changes in fees and expenses. However, applicable changes to these items must be communicated to both participants who already received the annual notice, as well as to those who are just becoming eligible to direct investments. According to the Department of Labor’s Field Assistance Bulletin 2012-02, there is no need to provide a new investment “comparative chart” every time there is a mid-year change in any investment alternative’s fee and expense information. One comparative chart disclosure per year is enough, but the DOL points out that changes must be made available to participants on an applicable web site, including the date of the change, as soon as reasonably possible. Other changes, such as a different investment alternative, must be communicated to all affected participants within the specified 30 to 90 day window period.

MISTAKES HAPPEN: FAVORABLE RESULTS FOR EMPLOYER

As we have said before, people make mistakes. Fortunately, the courts are aware of this, even in cases where the participant is repeatedly provided the wrong benefit amount. The case of *Stark v. Mars, Inc.*, decided last month, illustrates this.

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NATIONAL RETIREMENT SERVICES, INC.

Participant Stark resigned from Mars, Inc. in 2004 and was advised just prior to leaving that if she left the company at her current age 46, her estimated benefit at age 50 would be $2,758 per month. After reaching age 50 in 2009, Ms. Stark accessed a web site maintained by an administrative service provider and was advised she would receive an estimated $5,365 per month. However, the advice included a disclaimer that it "does not give any warranty or other assurances as to the content of the material appearing on the site, its accuracy, completeness, timelessness or fitness for any particular purpose." Stark, suspecting the amount to be a little too high, used a call-in center which provided a benefit of $5,364.63 per month. Stark applied for an immediate benefit and received documents necessary to initiate payment that also included reference to the $5,364.63 monthly benefit. These documents also contained disclaimers pointing out that Mars reserved the right to correct any errors and that the terms of the plan documents control. A few months later, the administrative service provider for the plan discovered that benefits for Stark and four others had been incorrectly calculated. Stark was advised by Mars that she had received $15,000+ in overpayments and that she had to make arrangements for repayment. She filed suit, citing Mars with a breach of fiduciary duty.

The Court found for the defendant Mars, Inc., referring to the error as "an honest mistake." Furthermore, neither the call-in center nor the service provider was acting as fiduciaries when they provided the erroneous information. Citing the disclaimers mentioned above, the Court found that Stark could not have reasonably concluded that Mars was making a binding representation.

Moral of the story: Plan Sponsors should have suitable caveats and disclaimers whenever representations are being made to participants concerning plan benefits so that they are protected in the case of an honest mistake.

REMINDER FOR SEPTEMBER

9/15/12
Minimum funding due for calendar defined benefit plans.

9/17/12
Form 5500 extended date for Plan Years ended 11/30/11.

9/30/12
Form 5500 due date for Plan Years ended 2/28/12.

9/30/12
AFTAP Certificate due for calendar defined benefit plans.

FOR MORE INFORMATION OR TO REQUEST A PROPOSAL, PLEASE VISIT OUR WEBSITE AT WWW.NRSERVICES.COM, OR FOR SALES SUPPORT, PLEASE CONTACT:

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