

ERISA Reporting And Disclosure: Eight Common Mistakes To Avoid

1. Failure to file notice of a blackout period.

Retirement plans must provide a notice to plan participants if the participants' ability to direct their investments in the will be limited for three or more business days. The plan's failure to provide such a notice may result in the plan fiduciaries being responsible for any potential investment losses for the period of "blackout."

2. Failure to include, with Form 5500, an independent qualified public accountant's opinion (where required).

Most retirement plans, with over 100 participants at the beginning of the plan year and certain welfare plans, must provide an independent qualified public accountant's opinion with Form 5500. The failure to provide the accountant's opinion (which is contained in the financial audit of the plan attached to the Form 5500) can mean that the entire filing is incomplete and could be rejected by the DOL (triggering late filing penalties).

3. Small welfare plan reporting exception.

ERISA generally requires all pension and welfare plans to file a Form 5500. A conditional exemption exists, however, for "certain small welfare benefit plans." To qualify, the welfare plan must have fewer than 100 participants as of the beginning of the plan year and:

- Provide benefits as needed solely from the general assets of the employer;
- Pay benefits solely from the general assets of the employer, through insurance contracts, or a combination (i.e., if the plan uses a trust, the exception is not available);
- And, in the case of insured plans, return refunds to participants within three months of receipt by the employer and the refund policy must be disclosed to participants when they enter the plan.

The most common mistakes (other than not knowing about exception) are forgetting to file a Form 5500 when the participant count exceeds 100 and changing funding mechanisms. If an employer uses a trust, the exception is not available.

3. The 80/120 participant rule.

Similar to item 2, ERISA allows a special reporting dispensation for certain small plans (those with more than 80 but fewer than 120 participants at the beginning of the plan year). For example, if a pension plan filed a Form 5500 for a year (because it had only 90 participants) and grows to 110 participants by the beginning of the next plan year, the employer may file the simpler Form 5500 in the year rather than the full, more detailed Form 5500. This avoids the financial statement audit requirement. Some plan sponsors, either through acquisition or company growth, cross the 100 participant threshold and either forget to take advantage of the special rule or forget to file entirely when a Form 5500 is required.

4. Failure to report on “stop loss” policy.

Most common to self-funded medical plans, a stop loss policy insures either the sponsor or the plan against large claims. If a plan’s stop loss policy is purchased by the plan, rather than by the employer, then it is considered a plan asset for ERISA purposes and must be reported on the plan’s Schedule A to Form 5500. If the stop loss policy is purchased by the employer and is intended to reimburse the employer, rather than the plan, it is not considered a plan asset, ergo no reporting on Schedule A. Simple solution: report on Schedule A or make sure stop loss coverage is purchased by the employer rather than by the plan.

5. Failure to file Form 5500 and provide disclosures because employer doesn’t realize it has a plan.

This problem frequently arises in the area of severance arrangements where the employer does not appreciate the fact that the arrangement may be an ERISA-covered welfare plan. It also comes up in arrangements where the employer allows an insurance provider to sell certain “employee-pay-all” benefits to employees. If done properly, the employer has no reporting obligation for an “employee-pay-all” plan because of a regulatory exception that says the employer isn’t sponsoring the plan. For example, certain life insurance products and code section 403(b) deferred compensation arrangements are sold this way; the employer merely provides a forum for the insurance company to solicit employees and allows a “check off box” for paying premium by payroll deduction. Problems arise, however, if the employer takes a more active role, such as prominently printing the employer’s name on the SPD or taking credit for the employee plan.

6. Failure to file a “top hat” statement.

“Top hat” plans that provide benefits for a “select group of management or highly compensated employees” are generally exempt from ERISA’s reporting and disclosure rules. However, in order to be exempt the plan sponsor must file a simple statement with the DOL when the plan is first adopted. Plan sponsors who miss this filing requirement don’t fall within the exemption from ERISA’s vesting, participation, reporting, and disclosure rules.

Failure to file a top hat statement exempting the plan from the annual Form 5500 filing requirement, and not filing the Form 5500, may result in DOL-assessed penalties of up to \$1,000 a day against the plan administrators. However, top hat sponsors in this situation may obtain relief by paying a reduced penalty of \$750 and filing the top hat statement in the DOL’s Delinquent Filer Voluntary Correction Program.

7. Pension plan failure to provide ERISA section 204(h) notice.

Pension plans subject to ERISA’s funding requirements must provide an ERISA Section 204(h) notice prior to the effective date of any significant reduction in future benefit accruals (e.g., reducing the accrued benefit rate under a money purchase pension plan). Failure to provide the notice will, in most cases, result in the imposition of an excise tax based on the extent of the failure, and in an egregious case, may render in the plan amendment ineffective (i.e., the employer’s funding obligation will continue until the disclosure and the amendment are done properly). In cases where the employer’s funding obligation is high, this can be an extremely expensive mistake, both in terms of cost to the plan of sponsor increased funding and the cost associated with violating the law’s minimum funding requirements.

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