THE EMPLOYEE BENEFIT
Forum
current issues in retirement benefit planning

NORTH CENTRAL TRUST COMPANY
Established 1913

Why Have a Written Investment Policy Statement?

SITUATION: We have a 401(k) plan that allows our employees to direct the investment of their own plan account assets. We comply with all of the pension law's Section 404(c) requirements so that our liability for investment decisions made by participants is limited. However, we don't have a written investment policy statement. A colleague of mine says we should.

QUESTION: Why should we have a written investment policy statement?

ANSWER: Although a written policy is not required, it would provide your company with a critical measure of fiduciary liability protection if the plan's investment choices or their performance were challenged.

DISCUSSION: A written investment policy statement is documentary evidence that a carefully considered investment policy exists. A policy statement provides the employer and other plan fiduciaries that are responsible for plan investments with investment management guidelines. It also provides a process for making broad investment management decisions, setting investment goals, and communicating the policy to employees. Without a prudent investment policy, an employer could be found liable for fiduciary shortcomings, including poor investment results.

While the specific needs of each individual plan and sponsor determine what should be included in an investment policy statement, these statements generally include:

- The plan's investment goals.
- Roles and responsibilities of those involved with plan investments.
- Considerations and guidelines used in selecting and replacing investments and investment managers.
- Procedures for monitoring investment performance, directions as to how managers should report performance, and a review schedule.
- A statement deferring to the plan document's provisions if a conflict arises.
- A description of how participants may control their plan account investments, the manner and frequency of investment performance reporting, and what educational materials will be provided to help participants make informed investment decisions.

Once you have established an investment policy, you, as the employer, or the company's benefits committee should review it regularly and revise it as needed.

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Gen X and Gen Y on Retirement Savings Plans

What do younger workers think about saving for retirement? Do they appreciate having a retirement savings plan? The American Savings Education Council and AARP recently surveyed members of Generations X and Y (ages 19 to 39) on personal finances and saving and came up with some answers that may help you attract these employees to your plan and keep them participating.*

Among the findings: 88% of those surveyed consider a retirement savings plan, such as a 401(k) plan, to be an important workplace benefit. A slightly greater proportion (89%) says it's important for an employer to match employee contributions or make other plan contributions on their behalf. Overall, 71% of those eligible to participate contribute to their employers' plans.

Also, 85% of those surveyed think it's a good idea for an employer to voluntarily enroll employees automatically in its retirement savings plan and set up automatic salary deferrals to the plan.

* *Preparing For Their Future, A Look at the Financial State of Gen X and Gen Y*, American Savings Education Council and AARP, March 2008

Seven-day Safe Harbor for Depositing Small-plan Contributions

You probably already know that sponsoring a tax-qualified retirement plan helps you retain qualified employees and helps your employees save for retirement. But you may not be as sure about when you're supposed to deposit employee contributions into the plan trust account. Regulations proposed by the U.S. Department of Labor (DOL) should help clear up any confusion.

Generally, the money an employee contributes to a 401(k) plan or other retirement savings plan must be deposited into the employee's plan account as soon as administratively possible. In the past, it was unclear *exactly* when a deposit was considered late. The DOL's proposed regulations provide a specific deadline for depositing employee contributions. Where applicable, employers will have a safe harbor period of within *seven business days* after receipt or withholding to complete the transfer. They will be in compliance if deposits are made within the seven-business-day window.

However, these proposed regulations only apply to small plans — those with fewer than 100 participants. Larger plans must deposit contributions as of the earliest date the contributions can be separated from the employer's assets, but in no event later than the 15th business day of the month following receipt or withholding.

It's important that you deposit contributions on time and keep accurate records of those deposits. Late contributions could lead to penalties and liability for lost investment returns on the contributions.

While the regulations aren't finalized yet, small-plan sponsors may take advantage of the safe harbor immediately by following the seven-day rule for depositing employee contributions.

Small-plan sponsors may take advantage of the safe harbor immediately.

Mind Your Fiduciary Responsibilities

A recent U.S. Supreme Court case* has caused a lot of buzz in employee benefit circles about employers' fiduciary responsibilities. Below, we answer some questions about those responsibilities and the new ruling.

What are a retirement plan sponsor's fiduciary duties? Basically, under pension law (ERISA), a retirement plan sponsor (and other plan fiduciaries) must operate its plan solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits. All related duties must be performed with the care, skill, prudence, and diligence that any prudent person acting in a like capacity and familiar with such matters would use. As a fiduciary, you must diversify the plan's investments to minimize risk, unless it is clearly prudent not to, and perform all duties in accordance with your plan's documents and other instruments governing the plan, unless they violate ERISA.

Why is the recent case important? Essentially, the case clears the way for plan participants to commence an action for individual losses resulting from a plan fiduciary's failure to timely follow the participant's investment directions.

What are the details? Like most 401(k) plans, the plan that was the focus of this case allowed participants to manage their own account investments. LaRue, the participant who brought the lawsuit, contended that he had directed his employer to make certain changes to his account investments, but those directions were never followed. As a consequence, his account lost $150,000. His employer, DeWolff, argued that LaRue could not assert such a claim under ERISA because the alleged fiduciary misconduct affected only his account and not the entire plan. Two lower courts agreed with DeWolff.

The Supreme Court, however, disagreed with the narrow interpretation of the pension law. The Court clarified that pension law allows individual recoveries for breaches of fiduciary duty that reduce the value of an individual participant's account. It is not necessary for the fiduciary breach to threaten the entire plan.

Should we be concerned about the ruling?
Some plan sponsors fear the ruling will increase claims against 401(k) and other individual account plan administrators, investment managers, and other fiduciaries. Under the ruling, employees will no longer have to prove plan-wide losses to claim individual losses that result from alleged breaches of fiduciary duty. However, the danger may not be that great for many plan sponsors.

Why? Most 401(k) plan sponsors rely on professionals to handle investment changes, rather than processing the changes themselves. This can minimize the chance of error. So, rather than viewing the ruling as a cause for concern, you might look at it as a reminder to fulfill your fiduciary duties carefully.

Are there actions we should take? You should make sure that you have individuals with appropriate expertise administering your plan. Also:

- Review your plan's Section 404(c) compliance and fiduciary practices.
- Comply with the safe harbor requirements for qualified default investment alternatives.
- Have a written investment policy statement.
- Document all fiduciary decisions.
- Make sure the plan is being administered according to the plan documents.
- Seek professional assistance with your plan's investments.

If you have questions about your fiduciary duties to your plan, 404(c) compliance, or plan investments, please give us a call.

* *LaRue v. DeWolff, Boberg & Associates, Inc., et al.*, S Ct 2008

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RECENT DEVELOPMENTS
In Benefit Plans

The Importance of Benefits. A recent survey asked employers and employees to identify work-related elements that promote feelings of loyalty. Seventy-two percent of employees rated retirement benefits as "very important" loyalty factors — a tie with advancement opportunities — compared with only 41% of employers who rated retirement benefits as very important. Recognizing the importance of your retirement plan in influencing employee loyalty may help you position your company to retain its best workers.

Guidance on Roth Rollovers. Starting in 2008, employees may roll over distributions from eligible retirement plans, including 401(k), 403(b) annuity, and governmental 457 plans, into Roth IRAs. The IRS recently issued guidance on these rollovers. The guidance clarifies that the amount of the (otherwise taxable) distribution must be included in gross income, and income taxes will be due on the amount rolled over to the Roth IRA in the year of the rollover. Mandatory 20% withholding is not required on direct trustee-to-trustee rollovers, even if the distribution is includable in income. Also, the 10% early distribution penalty won't apply unless the rolled over taxable funds are withdrawn from the Roth IRA within five years of the rollover. For tax years beginning prior to January 1, 2010, employees must meet certain income and filing status requirements to be eligible for a Roth rollover. Note that employers (or other plan administrators) are not responsible for ensuring that an employee is eligible to make a rollover to a Roth IRA.

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