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NOBLE DAVIS CONSULTING, INC

PEACE of MIND

PLAN SPONSOR RETIREMENT PLAN UPDATE

Quarter 3, 2011

Second Annual Top 10 Issue

Did you know?

We recently won the NorthCoast 99 awards (honoring great workplaces for top talent in Northeast Ohio) for the third consecutive year.

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Top 10 Plan Design Options

Retirement plans must have a written plan document. These plan documents offer many choices for you to make as the plan sponsor. If you haven't thought about the choices your plan could offer, here is a sample of our top 10:

1) **Safe Harbor Plan** - A safe harbor plan is designed to have a "free pass" on many of the required compliance tests, including the ADP/ ACP test, the top heavy test and the coverage test. The plan will have a required employer contribution to participants and 100% vesting is required for the safe harbor contribution, but it does allow your Highly Compensated Employees and owners to have more freedom to defer their compensation.
2) **Roth 401(k) Plan** - 401(k) plans with designated Roth accounts are becoming more popular. These plans allow participants to invest their deferrals into Roth accounts that will avoid taxation at the time of distribution, similar to a Roth IRA. Plans may also allow some participants the ability to convert their existing pretax plan account balances into Roth accounts within the plan (several restrictions do apply).
3) **Automatic Contribution Arrangement (ACA)** - These 401(k) plans automatically enroll all participants at a uniform deferral percentage. The participants may choose to stop the deferral, but the idea is to take advantage of the tendency of the participant to put off saving for retirement and withhold deferrals automatically. It can greatly help with the passage of the ADP/ACP test, but it can also increase employer costs if there is an associated employer match.
4) **Eligible Automatic Contribution Arrangement (EACA) -** Similar to the ACA above, this 401(k) plan allows distributions of the automatic deferrals in the first 90 days following enrollment. The plan also allows an extended due date for the ADP and ACP Testing.
5) **Qualified Automatic Contribution Arrangement -** Similar to the ACA

10 Companies with the Best Retirement Plans

Do you want to know what other Plan Sponsors are doing in their plans? Read on to see what CNBC.com says are the 10 companies with the best retirement plans:

1) Chesapeake Energy in Oklahoma has one of the highest matches—100% on the first 15% of deferrals.
2) Devon Energy in Oklahoma offers a match that increases the longer an employee stays with the company. Also, they contribute a profit sharing allocation of up to 10% of pay.
3) Qualcomm in California matches 100% of the first $1,500 deferred, then 50% on the next $1,500 and 33% on the next $7,500. It's 10% after that.
4) Genentech in California makes a 2% profit sharing to all employees and then matches 100% on the first 5% of pay.
5) Microsoft in Washington allows employees to immediately enter the plan and vests them immediately as well. They offer a match of 50% on the first 6% of pay. They also offer a specialized investment education program.

6) Aflac in Georgia matches 50% on the first 6% deferred, but also offers an old-fashioned defined benefit plan with an interesting twist—when your age and service add up to 80, you can retire no matter how old you are.
7) USAA in Texas offers a dollar for dollar match up to 8% of pay plus a 9% contribution into a cash balance plan. Employees may earn another 3-9% in profit sharing allocations if the company meets certain performance targets.
8) Colgate-Palmolive match 50-70% on the first 15% deferred. They also pay 100% of the costs of a financial planning course, up to $10,000 per year.
9) Mitre in Virginia has a retirement plan that pays employees 80-100% of their salary after retirement. The match plus employee contributions can be up to 12% of salary. Vesting is also immediate.
10) Publix in Florida has an ESOP plan that contributes 10% of pay with average annual returns of 17%. They also have a 401(k) plan.

Top 10 Plan Design Options Continued

and EACA, this 401(k) plan requires annual employee deferral escalation each year and a required employer contribution. This type of plan does have a "free pass" for ADP/ACP testing.

6) **Cross Tested Allocation -** Generally, plans must not discriminate in favor of the Highly Compensated Employees (HCEs). However, by testing contributions on a benefits basis, it is often possible to allocate a much larger contribution to the owners or HCEs, while keeping the contributions to the rest of the participants low. There is even an opportunity to allocate a different contribution to each participant if each participant is set up in their own group. This plan design offers the ultimate in flexibility for employer contributions.
7) **Integrated Contribution -** For those plans where the demographics are not suited to the cross tested allocation mentioned above, there may be an opportunity to allocate a larger percentage of a profit sharing contribution to higher paid individuals through an integrated contribution. This plan design takes into account the fact that higher paid individuals don't accumulate social security benefits on wages in excess of the Social Security wage base ($106,800 in 2011).
8) **Cash Balance Plans -** For companies that are providing the maximum contributions to their owners/HCEs inside their 401(k) plan, a cash balance plan may be a consideration. Cash balance plans are defined benefit plans designed to look like a defined contribution plan. They have mandatory contributions, but much higher contribution limits.
9) **Elapsed Time -** Most plans base either initial eligibility or vesting on the accumulation of a certain number of hours worked. If collecting and maintaining employee hours is difficult for you, the plan can be amended to an elapsed time method. This way the plan can compute vesting and entry dates just by using the date of hire.
10) **Catch Up Contributions -** Plans may allow participants over age 50 to defer an extra dollar amount to the plan ($5,500 for 2011), in excess of the normal 401(k) deferral limit (of $16,500 in 2011). Match may also be applied to the catch up deferral contribution, resulting in greater allocations.

There are many plan design options available. If any of these plan design options sound interesting, please contact your plan administrator for more information.

Top 10 Excuses for Not Saving for Retirement

10. I'm too busy

9. It's too soon

8. It's too late

7. I don't need to

6. I don't have enough money to get started

5. My finances are a mess

4. The government will take care of me

3. Between my savings and my 401(k), I'll be fine

2. I don't want to think about it

1. I don't know how

Getting To Know Us...

Meet Jennifer Sofranko...

It was the best of times, it was the worst of times....

My experience in the benefit world began in 1988 in Human Resources. My focus soon narrowed to the pension and profit sharing field where I have been happily immersed for the last two decades. I cheerfully joined Noble-Davis in 2007 and hope to cheerfully retire from here sometime during this millennium! I was born, raised (in a large noisy family) and still live in Akron, Ohio and enjoy the new and improved Route 8 daily during my commute. Outside of work I practice Tai Chi, enjoy reading, games, puzzles and love spending time with my family.

Top 10 Hidden Liability Pitfalls Plan Sponsors Should Avoid

Being a retirement plan fiduciary such as a plan sponsor or a plan trustee is like being a homeowner. Homeowners see their homes as a serious financial accomplishment and an important investment. Homeowners are unaware of the hidden liability pitfalls that homeownership entails, like lawsuits for those injured on their property or the liability to trespassers who are injured because of an attractive nuisance like a swimming pool. The same can be said of a plan sponsor or a plan trustee that is unaware of the hidden liability in their roles as plan fiduciaries.

Retirement plan fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. These responsibilities include: acting solely in the interest of plan participants and with the exclusive purpose of providing benefits to them; carrying out their duties prudently; following the plan documents; diversifying plan investments; and paying only reasonable plan expenses.

While these duties seem pretty straightforward, there are certain instances where a plan sponsor is unaware that their action or inaction puts them at risk to liability from either plan participants or governmental agencies such as the Department of Labor (DOL) and the Internal Revenue Service (IRS). For plan trustees, that liability may be personal liability. This article details pitfalls that plan fiduciaries are usually unaware of, that exposes them to potential fiduciary liability.

10. The ERISA bond does not protect plan fiduciaries from liability.

The DOL requires retirement plan fiduciaries to procure a bond equal to at least 10% of the amount of funds in the Plan, subject to a minimum bond of $1,000 and a maximum bond of $500,000 per plan ($1 million if the plan holds employer securities). An ERISA bond specifically insures a plan against losses due to fraud or dishonesty on the part of persons (including, but not limited to, plan fiduciaries) who handle plan funds. It does not protect plan fiduciaries from a breach of fiduciary liability. Fiduciary liability insurance can protect plan fiduciaries from such liability and should be purchased. I once represented a statewide union that had its $1 million in legal fees (albeit with a $100,000 deductible) paid by their fiduciary liability carrier after “winning” a class action lawsuit brought against them by plan participants. Without such a policy in place, my client would have had to cough up the extra $900,000 in legal fees from their own pocket.

9. The use of a corporate trustee does not protect the plan sponsor from liability.

Many plan sponsors use a corporate trustee for their retirement plan because the owners of the plan sponsor may not want to serve as trustees (exposing them to potential personal liability) or because the use of a corporate trustee allows a plan that is required to have an audit for their Form 5500 filing to have a limited scope audit (which is much less than a full scope audit). A corporate trustee does not assume the liability of the plan sponsor as plan fiduciary. A corporate trustee will pay out participants and file the required tax withholding forms. They do not hire retirement plan providers, monitor costs, review plan documents, and ensure proper plan administration. Therefore, plan sponsors are still on the hook.

8. If plan fiduciaries are not retirement plan experts, they should hire some.

The duty to act prudently is one of a plan fiduciary’s central responsibilities under ERISA. It actually requires the plan fiduciaries to have expertise in a variety of areas, such as investments. Lacking that expertise, the fiduciaries need to hire providers with that professional knowledge to carry out the investment and recordkeeping functions. I have seen too many plan fiduciaries operate their plans without a financial advisor, without someone with the financial background to pick plan investments and educate participants. All retirement plan providers need to have some retirement plan experience, so plan fiduciaries should make sure all their retirement plan providers are retirement plan experts.

7. The hiring of plan fiduciaries must be selected through a process.

When it comes to hiring a financial advisor or a TPA, the plan fiduciaries need to have a process. They need to document how and why they selected a plan provider because hiring a retirement plan provider is a fiduciary function. Simply having the plan fiduciaries pick a financial advisor because he is related to someone who owns the plan sponsor or works for the plan sponsor isn’t enough. Plan fiduciaries need to review the experience of the plan providers they are interested in hiring, as well as the quality of their services.

Top 10 Hidden Liability Pitfalls Continued

6. Plan fiduciaries need to keep good records.
While plan fiduciaries hire retirement plan providers to help them manage their fiduciary responsibility, plan fiduciaries need to keep all plan records as well as document all decisions they make on their own or in conjunction with one of their providers. Retirement plans are legal entities with legal documents that have legal consequences. So plan fiduciaries should always have copies of all plan documents, amendments, valuation reports, government filings, asset statements, trustee meeting minutes, and investment making decisions. TPAs, financial advisors, and ERISA attorneys may have some plan records, but a plan fiduciary is required to have all the plan's records because it's their responsibility.

5. Avoid the one stop shop; plan fiduciaries should hire at least one retirement plan provider who is independent.
Too many plan fiduciaries select a plan provider that serves all functions when it comes to a retirement plan. This provider is the TPA, financial advisor, and provides all the legal documents. Having one retirement plan provider to serve all those functions is a terrible idea because there is a lack of checks and balances if none of the plan providers are independent of each other. Having at least one retirement plan provider independent from another allows for each provider to check up on the other to make sure that the other is also doing their job. I have found too many plan fiduciaries who have suffered financial harm because they put all their "eggs" with one retirement plan provider because since the provider was wearing all the hats, there was no one to tell the plan fiduciaries that the provider wasn't doing their job.

4. Plan fiduciaries need to know the cost of their plan's administration.
Retirement plan fiduciaries need to know the cost of their plan's administration. They need to know how much they are being charged by their retirement plan providers and this is often difficult when retirement plan administration has fees that are often hidden from plan sponsors. While retirement plan fee disclosure is soon to be implemented by the DOL where plan fiduciaries will be disclosed the fees being charged by their plan providers, fiduciaries need to know the fees they are being charged now because plan fiduciaries that are unaware of the fees being charged are often sued by plan participants. Excessive fee lawsuits have been a great boon to the business of ERISA litigators.

3. Plan fiduciaries need to annually review the cost and services of their plan providers, as well as their Plan.
Plan fiduciaries need to annually review their plan providers for their cost and the services they provide. It's not enough for plan fiduciaries to know the costs being charged by their plan providers, they need to determine whether these costs are reasonable for the services provided. They can only do that by reviewing what competing service providers in the marketplace charge for the services they provide. In addition, plan fiduciaries should monitor their plan providers in the work they do. There are too many financial advisors who don't do the bulk of their jobs, such as working with the plan fiduciaries on an investment policy statement or educate participants. If they cannot determine whether plan providers are doing their job, an independent retirement plan consultant or ERISA attorney could be hired for that task. Plan fiduciaries should also annually review their plan to see if the plan's provisions still fit their needs.

2. Plan fiduciaries are responsible for the errors and malfeasance by the retirement plan providers they selected.
The buck stops with the retirement plan fiduciary. So plan fiduciaries are still legally responsible for the retirement plan providers they hire. So if a financial advisor that is hired is the second coming of Bernie Madoff or the TPA doesn't make the required filings, plan fiduciaries are still liable for them. I represent an 80 year old woman being sued by the DOL because the TPA she hired didn't provide her with valuation reports for 28 years and didn't provide the necessary distribution forms for her so that the DOL thinks she stole money or improperly borrowed from the plan. Despite her pleas that this is not her fault, as a plan fiduciary she is at fault. Hiring a retirement plan provider in and of itself is a fiduciary function. Hiring a bad retirement plan provider is a breach of that function and duty.

1. Just because a plan is participant directed, plan fiduciaries may still be on the hook.
The biggest major misconception that plan fiduciaries may have is that if their plan offers participants the right to choose their investments, then they are exempt from liability under ERISA §404(c). Plans that do not have an investment policy statement or consistently monitor plan investments or offer investment education to plan participants have often found themselves as defendants in a lawsuit by plan participants for breach of fiduciary liability.

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Mark Your Calendar

Stay on top of your retirement plan's mandatory deadlines! Here are some important dates in the upcoming months. (Please note that filing dates are for calendar year plans. Non-calendar year plans must adjust these dates.)

Each Payroll: Remit deferral and loan repayments within 7 business days (small plans) or as soon as possible (large plans)

September 15: Extended deadline for filing of corporate tax returns and contribution deadline for deductibility

September 30: Summary Annual Report due to participants (if Form 5500 not extended)

October 17: Extended deadline for Plan's annual Form 5500 filing

November 14: Third quarter PPA Statements due for participant directed plans

December 1: Deadline for 2012 safe harbor notice to be available for plan participants.

December 15: Extended deadline for distributing Summary Annual Report to participants (if Form 5500 extended)

January 31: 1099-R Forms must be sent to participants

February 10: Form 945 are due (if no payment required)

February 14: Fourth quarter PPA Statements due for participant directed plans

February 10: Forms 1099-R are due to the IRS

March 15: Corrective distributions due for failed ADP/ACP Testing

March 15: Corporate Tax Return and contributions due (without extension)