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Do You Know What You're Paying for Your 401(k) Plan?

By Scott J. Stitt and Ann M. Caresani

Many companies offer an employee retirement plan (such as a 401(k) or a SIMPLE IRA plan). These employer-sponsored plans are governed by the federal Employee Retirement Income Security Act (ERISA). The Department of Labor (DOL) has taken an increasing interest in ERISA retirement plans – focusing on the suitability of the investments offered and the costs to participants. Many large companies have been sued for offering retirement plans with investment options alleged to be unsuitable or too costly. For example, the ABB, Inc. 401(k) plan was found to violate ERISA, resulting in an award of over $13 million, because of insufficient due diligence to investigate and monitor the fees incurred by plan participants.

Here are a few questions to consider if you sponsor or participate in a retirement plan:

Who is the "fiduciary" responsible for your plan's investments?
ERISA requires a "fiduciary" to be named in every plan. Is your plan's fiduciary the company, the company's executives, or the plan's investment advisor? Sometimes the company's executives think the answer is "the investment advisor," but the company's executives may actually have fiduciary responsibility because the investment firm serves only as a non-fiduciary advisor to the executives. Make sure you know who is responsible for investment decisions.

The DOL proposed in April 2015 a "Conflict of Interest Proposed Rule," which would redefine the term "fiduciary" under ERISA to include more advisors and investment advice than ERISA currently covers. That rule is likely to be finalized in 2016, and may change the relationship between your plan and your investment advisor. Ask your investment advisor whether the proposed rule, if finalized, will change anything in your plan.

What investment options are offered in your plan?
Can you determine all of them? Is there a range of investment options for different types of investors, and a range of fees associated with those options?

How much does your plan cost?
Retirement plans are not "free." Someone is paying something. Find out if your plan uses more active management (and higher fees) or takes a lower-cost approach. Can you determine the fees associated with each investment option? Who

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Offering Certain Reimbursement Plans Without Offering Health Insurance Can Lead to Excise Tax Trouble

By Joseph R. Popp

Many employers make available some type of reimbursement arrangement, such as an employer payment plan, instead of sponsoring health insurance. An employer payment plan is an arrangement through which an employer pays, directly or indirectly, an employee's premiums for an individual insurance policy or Medicare Part B or D premiums. These arrangements are typically treated as deductible expenses of the company and are tax free to the employee.

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is paying for the service providers to your plan (such as the investment manager or third-party administrator)? How much is being paid to those advisors and where is the money coming from?

If you have a 401(k) plan, there are 1) fees that must be disclosed to every plan participant in a 401(k) plan (the "participant disclosures," or 404(a) disclosures); and 2) fees that every plan's service provider must disclose to the company sponsoring a 401(k) plan (the "service provider disclosures," or 408(b)(2) disclosures).

The participant disclosures describe the fees charged by each investment option available to the participant. The service provider disclosures describe the services to be provided and all direct and indirect compensation to be received. Even if you have a plan that is exempt from the required disclosures, you can ask for this information.

Knowing the answers to these questions is a good first step toward complying with ERISA, and hopefully avoiding issues down the road.

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According to the IRS, Department of Labor, and Health and Human Services, these arrangements, when covering two or more active employees, are considered to be "group health plans" and therefore must satisfy the Affordable Care Act's (ACA) applicable group market reforms. However, because of the ACA's rules on minimum essential coverage, such a plan *without an actual offer of insurance* cannot comply with the Affordable Care Act's market reforms. It is sometimes possible to integrate some of these benefits with another group health plan offered by the employer for purposes of the ACA requirements.

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"Group health plans" that are not in compliance with the ACA's reforms may be subject to a $100 per day, per employee excise tax. To put this in perspective, the penalty imposed on a large employer should they choose to not offer health insurance is $2,000 per employee, per year. The $100 per day excise tax is $36,500 for one employee over the same time period. In many cases, I have seen employers purposely drop insurance and take on the $2,000 per employee pay or play penalty because it works out better for both the company and, with the inclusion of premium subsidies, the employees too. The same cannot be said of this $100 per day excise tax; there is no good reason to *ever* run afoul of it.

For employers that sponsor a premium reimbursement arrangement, consider the following options to avoid this excise tax: (1) eliminate the program altogether; (2) remove the program but take some of the savings and provide general (i.e. not tied to health insurance costs) raises to employees; or (3) modify the plan to include an offer of health insurance coverage that would satisfy ACA requirements.

An increase to employees' compensation, without conditioning the payment of the additional compensation on the purchase of health coverage and absent an endorsement of a particular policy, form or issuer of health insurance, does not qualify as an employer payment plan and, thus, will not be subject to ACA reforms or the $100 per employee per day excise tax. Lastly, employers can adopt a Health Reimbursement Arrangement integrated with a group health plan that satisfies the applicable market reforms.

Temporary transition relief on this issue ran out on June 30, 2015 for most employers. Excise tax penalty relief is still available for reimbursements of individual health insurance coverage under S-corporation healthcare arrangements, so long as it is *only* offered for two-percent or greater shareholder-employees. This relief is available at least through 2015, and until the IRS publishes further guidance on the application of the market reforms to an S-corporation two-percent shareholder-employee healthcare arrangement.

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