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Benefits *Update*

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DOL Issues Final Regs On QDIA's

By Sandy Feingerts (New Orleans)

Participant-directed accounts have become the norm in most 401(k) plans. But with the increase in the number of plans utilizing automatic enrollment features, plan fiduciaries should review the default investment for participants who fail to make an investment election.

Last October, the Department of Labor released final regulations that give plan fiduciaries concrete guidance on appropriate default investments for a plan.

Fiduciaries who comply with the final regulations will not be liable for any loss that occurs as a result of the "qualified default investment alternative" (QDIA) provided the following conditions are met:

1. The participants whose accounts are invested in a QDIA must have had the opportunity to direct the investment of assets but failed to do so;

2. Participants must receive a notice about the investment that will be made on their behalf if they don't affirmatively elect;

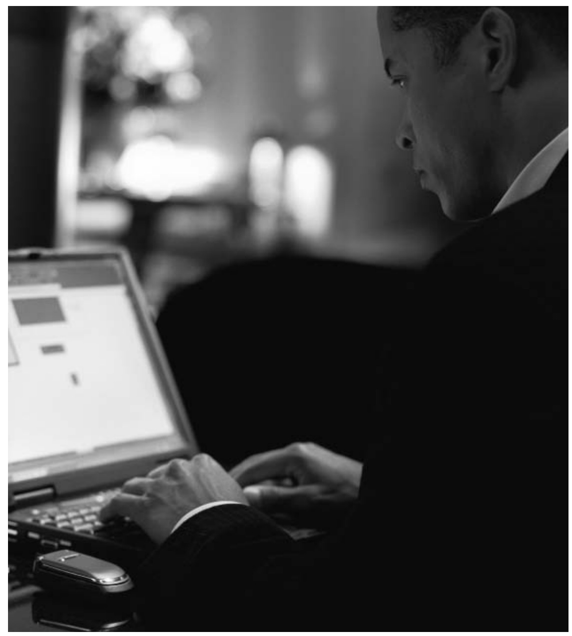
3. Materials provided to the plan relating to the QDIA (account statements, prospectuses, proxy voting materials, etc.) must be provided to the participants;

4. A Participant with a QDIA must continue to have the opportunity to transfer his/her account to the other investment alternatives available under the plan; and

5. The plan must provide a broad range of investment alternatives.

What Is A Qualified Default Investment Alternative?

A QDIA, as described in the final regulations, is an investment fund, product or model portfolio that provides



long-term appreciation and capital preservation through a mix of equity and fixed income exposures which can be described as one of the following;

Life-Cycle or Targeted-Retirement-Age Fund

A product that changes asset allocations and associated risk levels over time with the objective of becoming more conservative with increasing age.

Balanced Fund

A product that is diversified so as to minimize the risk of large losses and designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with a target level of risk appropriate for participants of the plan as a whole.

Professionally Managed Fund

An investment service that allocates the assets of a participant's individual account to achieve varying

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degrees of long-term appreciation and capital preservation through a mix of equity and fixed income investment alternatives offered under the plan, based on the participant's age, retirement date or life expectancy.

Generally, a capital preservation type of fund, such as a stable value fund or money market fund, is not considered a QDIA unless it is limited to the first 120 days after the date of a participant's first elective contribution.

Notice Requirements

The Internal Revenue Service has posted a Sample Automatic Enrollment and Default Investment Notice on its website which can be obtained at http://www.irs.gov/pub/irs-tege/sample_notice.pdf.

The notice to participants must contain the following:

- a description of the circumstances under which the assets in the participant's account will be invested on behalf of the participant in a qualified default investment alternative and, if the plan has automatic enrollment, an explanation of that plan feature;

- an explanation of the right of the participant to direct the investment of his or her individual account;

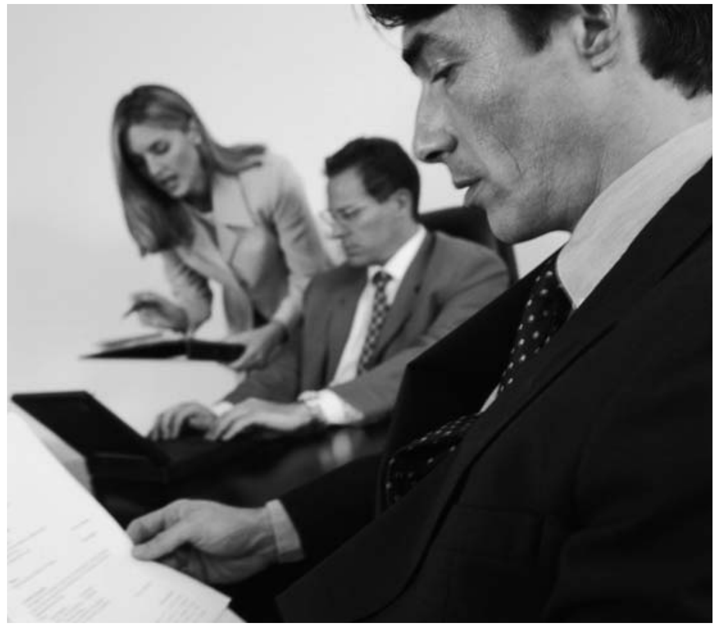
- a description of the qualified default investment alternative and the investment objectives, risk and return characteristics (if applicable) and applicable fees and expenses;

- a description of the right of the participant to direct the investment of his or her account to any other investment alternative under the plan, and any fees applicable to such change or transfer; and

- an explanation of where the participants can obtain investment information concerning the other investment options available under the plan.

The notice must be provided to participants at least 30 days prior to the date of eligibility and thereafter every plan year at least 30 days before that year begins.

If the plan has immediate eligibility (i.e., from the first day of employment) the notice can be given 30 days in advance of the first



investment in a QDIA. This rule also covers former employees who are reemployed and eligible immediately even if the plan has an eligibility waiting period.

If the participant has the opportunity to withdraw any automatic contributions made on his/her behalf within 90 days after the first such contribution is made, the notice may be given on or before the date of eligibility.

The notice cannot be provided through a summary plan description or summary of material modifications, but the notice can be combined with any notice required for automatic enrollment so that both notice requirements are satisfied in a single disclosure document.

What Should Plan Fiduciaries Be Doing Now?

First, be sure that the plan's default investment qualifies as a QDIA. If your current default investment does not qualify as a QDIA, it should be switched to a QDIA. Next, prepare the QDIA Notice and distribute it to the affected plan participants. Fiduciary relief does not apply until 30 days after the Notice is provided to participants.

For more information contact the author at sfeingerts@laborlawyers.com or 504.522.3303, or contact any member of the Fisher & Phillips Employee Benefits Practice Group by emailing benefits@laborlawyers.com.

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