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Department of Labor

Pension and Welfare Benefits Administration

Disclosure Obligations Under ERISA; Request for Information; Notice

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Disclosure Obligations Under ERISA; Request for Information

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of request for information.

SUMMARY: This document requests information from the public concerning disclosure obligations of fiduciaries of employee benefit plans governed by ERISA. A principal component of ERISA's regulatory scheme is its specific disclosure rules, which generally impose two types of obligations on plan administrators: (1) Obligations to disclose certain information to plan participants and beneficiaries automatically; and (2) obligations to disclose certain information upon a participant's or beneficiary's request. The Department of Labor solicits comments in this document regarding the effect on employee benefit plans and employers of recent rulings of the United States Supreme Court and federal circuit courts regarding the extent of an ERISA fiduciary's duty to disclose information to participants and beneficiaries in addition to the specific disclosure requirements imposed under ERISA. The Department of Labor has in the past expressed its views on this matter by filing amicus briefs in related court cases. It intends to use the information submitted in response to this document as a basis for determining whether it would be appropriate for the Department to take more general action on these issues, such as by proposing regulations or legislative amendments.

DATES: Written comments are requested to be submitted to the Department of Labor on or before January 12, 2001.

ADDRESSES: Comments (preferably, at least six copies) should be addressed to the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, Washington, D.C. 20210. Attention: Disclosure RFI. All comments received will be available for public inspection at the Public Disclosure Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW, Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Ellen Goodwin or Susan Lahne, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N–5669, U.S. Department of Labor, Washington, D.C. 20210, telephone (202) 219–7461, or Patricia Arzuaga, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, D.C. 20210, telephone (202) 219–4600, x153. These are not toll free numbers.

SUPPLEMENTARY INFORMATION:

A. Background

The Department of Labor (Department) seeks information from the public concerning the disclosure obligations of fiduciaries of employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA contains specific disclosure rules, contained in Part 1 of Title I, that require disclosure of certain information to participants and beneficiaries. Part 1 generally imposes two categories of obligations on plan administrators: (1) Obligations to disclose certain information automatically; and (2) obligations to disclose certain information upon a participant's or beneficiary's request. The provisions contained in Part 1 of Title I describe the content and timing of both types of mandated disclosures. ERISA further imposes certain general duties, contained in Part 4 of Title I, on plan ''fiduciaries'' with respect to how they conduct their affairs.[1]

Certain recent rulings by the United States Supreme Court and several federal circuit courts have expressed views under a variety of circumstances on the extent to which the fiduciary duties in Part 4 of ERISA create disclosure obligations beyond those set forth in Part 1. The law in this area is still evolving. The Department is concerned that these rulings, coupled with recent changes in the laws governing the substantive requirements for employee benefit plans,[2] may have created uncertainty as to how plan fiduciaries may best conduct their affairs so as to satisfy their fiduciary and disclosure obligations under ERISA. Moreover, changes in work patterns of participants and beneficiaries, new forms of pension and health plan design, and changes to the provisions of ERISA and the private pension and welfare benefit system have resulted in questions about the application of fiduciary and disclosure provisions to differing circumstances. Although the Department has provided guidance to interpret and enforce the disclosure provisions in Part 1 of Title I and the fiduciary provisions in Part 4 of Title I through regulatory and other actions, the Department believes that these recent developments may suggest a possible need for further general guidance regarding the interplay of these provisions.

The Department now seeks public assistance in determining whether it would be in the interest of plans, and their participants and beneficiaries, for the Department to undertake action to clarify the extent of fiduciary duties under ERISA regarding disclosure and the interaction of this fiduciary duty with the specific disclosure requirements under Part 1 of Title I. The Department intends to consider a variety of possible actions, including (but not limited to) promulgation of formal regulatory guidance, more targeted intervention in litigation, enforcement actions, or legislative reform proposals.

1. Statutory Duties

With respect to automatic disclosures of information, ERISA specifically identifies particular documents and information that must automatically be provided to participants and beneficiaries independent of any request, for example, the Summary Plan Description (SPD)[3] and summary annual reports.[4] There are additional required disclosures that arise under particular circumstances (*e.g.,* material modifications in plan terms)[5] or as a result of the type of plan involved (group health plan versus other welfare benefit plans, self-funded plans versus insured).[6]

[1] A ''fiduciary'' is ''someone acting in the capacity of a manager, administrator, or financial advisor to a 'plan'.'' *Pegram* v. *Herdrich,* _ U.S. _, 120 S. Ct. 2143, 2151 (2000). *See* ERISA § 3(21); 29 U.S.C. 1003(21).

[2] For example, most states have instituted comprehensive benefit mandates for health plans. In addition, federal law now includes benefit mandates regarding portability of health coverage and nondiscrimination in benefits (Health Insurance Portability and Accountability Act of 1996), coverage for maternity hospital stays (Newborns' and Mothers' Health Protection Act of 1996), mental health (Mental Health Parity Act of 1996), and reconstructive surgery following mastectomy (Women's Health and Cancer Rights Act of 1998).

[3] ERISA section 104(b)(1); 29 U.S.C. 1024(b)(1) (SPD to be furnished to participant and beneficiary receiving benefits under the plan within 90 days of becoming participant or beneficiary).

[4] ERISA section 104(b)(3); 29 U.S.C. 1024(b)(3) (summary annual report to be furnished to participants and beneficiaries within 210 days after close of fiscal year of the plan).

[5] ERISA section 104(b)(1); 29 U.S.C. 1024(b)(1) (summary of material modification (SMM) to be furnished within 210 days after end of plan year during which modification was adopted).

[6] ERISA section 101(d); 29 U.S.C. 1021(d) (single employer plan required to notify participants and beneficiaries of failure to meet minimum funding standards); ERISA section 104(b)(1); 29 U.S.C. 1024(b)(1) (group health plan required to furnish summary to participants and beneficiaries of material reduction is covered benefits not later than 60 days after adoption of the change); ERISA

ERISA separately prescribes categories of documents that must be provided upon a participant's request, such as an annual individual statement of accrued benefits,[7] or the latest version of the plan's SPD, annual report, or any terminal report.[8] The statute also requires plans to provide to participants and beneficiaries, on written request, copies of any ''trust agreement, contract, or other instruments under which the plan is established or operated.'' [9]

2. Fiduciary Obligations

The general fiduciary duties set forth in Part 4 of Title I are simply summarized. Fiduciaries owe a duty of loyalty to plan participants and beneficiaries to act solely in their interest and for the exclusive purpose of providing benefits to them and defraying the reasonable expenses of administering the plan. ERISA section 404(a); *see Pegram*, 120 S. Ct. at 2151. A fiduciary must carry out his or her duties with the care, skill, prudence, and diligence under the prevailing circumstances that a prudent person with like knowledge and like capacity would use to conduct an enterprise of a like character with like aims; must diversify plan assets; and must operate the plan in accordance with its governing documents. *Id.* However, section 404 does not specifically articulate a duty regarding disclosure of information to participants and beneficiaries.

Recent court decisions have found that plan fiduciaries have a duty to disclose information not expressly required to be disclosed under Part 1 of Title I. These cases have involved the fiduciary duty to act solely in the interest of plan participants and beneficiaries and the issue of the extent to which this fiduciary duty encompasses a collateral duty to provide participants and beneficiaries with information they need to exercise their rights effectively under the plan, to protect their rights under ERISA, or otherwise to make informed decisions about their future. These decisions have differed with respect to their approach, and the law appears to be evolving. As a result of the differing judicial rulings, the rules applicable to fiduciaries regarding these obligations at present appear to vary according to the federal judicial circuit that has jurisdiction over the case.

In *Varity Corp.* v. *Howe*,[10] the Supreme Court opined that when a fiduciary speaks to participants and beneficiaries, the fiduciary standards of section 404 impose a duty upon the plan fiduciary to speak truthfully. Thus, a fiduciary may not lie to, or affirmatively mislead, a participant or beneficiary about plan terms or important aspects of a plan's status, such as whether the plan will soon be terminated. In reaching its decision, the Court expressly reserved the broader question of ''whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.[11] The Court's recent decision in *Pegram*, 120 S. Ct. at 2154 n.8, which addressed fiduciary issues arising out of medical decisionmaking under a group health plan, stated in dicta that ''it could be argued that * * * [a fiduciary] is obligated to disclose characteristics of the plan and of those who provide services to the plan, if that information affects beneficiaries' material interests.'' Although not part of the holding of the Court in *Pegram*, this dicta could be read to support the conclusion that, in certain circumstances, a fiduciary has an affirmative duty of disclosure. In *Pegram*, the plaintiff had challenged an HMO's system for awarding financial incentives to its physicians, which she claimed impermissibly encouraged HMO physicians to deny needed care in return for increased monetary rewards.[12]

Following the decision in *Varity*, lower federal courts have been confronted with a variety of issues regarding the scope of a fiduciary's duty to disclose, when such disclosure would not be expressly required under Part 1. The resulting decisions have created a patchwork of rules across jurisdictions. Certain circuit courts have held that providing misleading information to plan participants who inquire about, for example, their benefits under a plan or the extent of benefits generally under a plan may constitute a breach of fiduciary duty.[13] Other circuit courts have gone farther to impose an affirmative duty on fiduciaries to provide complete and correct information, regardless of whether a participant or beneficiary has specifically inquired.[14] Another circuit court has imposed upon plan fiduciaries a continuing ''duty to correct'' statements in an SPD that have become materially misleading to plan participants due to events subsequent to the distribution of the SPD.[15] Courts have recognized that circumstances that may necessitate plan changes, such as employer business reorganizations or bad financial times, may create a conflict of interest between plan fiduciaries and participants over what information should be disclosed. In defining the boundaries of required disclosures, courts have attempted to balance the conflicting needs of employers and participants in the area of increased benefits under so-called ''window plans'' by articulating tests requiring disclosure only when a company has become engaged in ''serious consideration'' of a plan change.[16] At the other end of the

section 103(e); 29 U.S.C. 1023(e) (plans offering coverage through an insurance policy required to disclose in annual report certain information regarding premium payments).

[7] ERISA § 105; 29 U.S.C. 1025.

[8] ERISA § 104(b)(4); 9 U.S.C. 1024(b)(4).

[9] *Id. Compare Teen Help Inc.* v. *Operating Engineers Health and Welfare Trust Fund*, No. C 98–2084, slip op. at 8 (N.D. Cal. Aug. 24, 1999) (utilization review criteria used to decide a claim for benefits are ''other instruments'' and must be disclosed upon request under section 104(b)(4)), *with Doe* v. *Travelers Ins. Co.*, 167 F.3d 53, 60 (1st Cir. 1999) (''mental health guidelines'' used to decide a claim were not ''other instruments'' and therefore not required to be disclosed upon request under § 104(b)(4)). In Advisory Opinion 96–14A (July 31, 1996), the Department expressed its view that ''any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement * * * would constitute an instrument under which a plan is established or operated'' for purposes of section 104(b)(2) and (b)(4), regardless of whether such information is contained in a document designated as the ''plan document.''

[10] 516 U.S. 489 (1996).

[11] *Id.* at 506.

[12] *Cf. Shea* v. *Esensten*, 107 F.3d 625 (8th Cir.) (holding that a plan administrator has a fiduciary duty to disclose all material facts affecting a plan participant's health care interests, including financial incentives that might discourage a treating physician from providing essential referrals for covered conditions), *cert. denied*, 522 U.S. 914 (1997). *But see Ehlmann* v. *Kaiser Foundation Health Plan of Texas*, 198 F.3d 552 (5th Cir.) (holding that ERISA does not impose a duty on fiduciaries to disclose physician compensation arrangements in absence of inquiry or special circumstances), *cert. dismissed*, ____ U.S. ____, 2000 WL 1146498 (Aug. 15, 2000).

[13] *Krohn* v. *Huron Memorial Hosp.*, 173 F.3d 542, 551 (6th Cir. 1999) (faced with a participant injury, fiduciary had a duty under ERISA to convey to the participant complete and correct material information as to his eligibility for benefits and options under the plan); *Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990 (same).

[14] *Farr* v. *U.S. West*, 151 F.3d 908, 913 (9th Cir. 1998), *cert. denied* ____ U.S. __, 120 S. Ct. 935 (2000) (finding that ''fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information'' where SPD provided incomplete information on tax treatment of lump sum distributions); *Jordan* v. *Federal Express Corp.*, 116 F.3d 1005, 1016 (3rd Cir. 1997) (finding that participant's failure to inquire did not preclude suit for breach of fiduciary duty for failure to disclose material facts regarding irrevocability of retirement elections).

[15] *McAuley* v. *IBM Corp., Inc.*, 165 F.3d 1038, 1046 (6th Cir.), *cert. dismissed*, ____ U.S. ____, 120 S. Ct. 38 (1999).

[16] *Bins* v. *Exxon, U.S.A.*, 189 F.3d 929, 935–37 (1999) (discussing different standards for ''serious consideration'' adopted by various federal circuits), *rev'd en banc*, No. 98–55662, 2000 WL 1126387 (9th

Continued

spectrum, other circuit courts have been reluctant to create new duties to disclose information to participants, regardless of the asserted value of the information to participants, beyond what is specifically required by Part 1 of Title I, ERISA's reporting and disclosure provisions.[17]

3. Issues To Be Addressed

Because the federal courts' decisions have differed in their treatment of many issues concerning the fiduciary duty to make disclosures to participants and beneficiaries, the Department wishes to determine whether it would be advisable to issue general guidance in this area to encourage uniform protections to participants and beneficiaries across the nation.[18] Therefore, the Department solicits comments to assist it in developing a basis on which to determine what actions, if any, would be in the public interest. The following specific questions are intended to highlight the areas of the Department's concern, but are not intended to limit the scope of comments. Please refer to the specific relevant question by number in responding to the enumerated questions. The Department solicits comment from interested parties on the following questions:

1. To what extent do the current reporting and disclosure requirements of Part 1 of Title I fail to meet the needs of participants and beneficiaries with respect to understanding their benefits, their rights under ERISA, and the consequences of choices offered to them under their plans?

2. To what extent do the current administrative practices of plans fail to meet any of the following standards, each of which has been articulated by one or more courts as part of a fiduciary's duty under Part 4 of Title I:

a. Plan administrators should provide complete and accurate information when responding to requests for automatic disclosures (courts have treated material omissions as affirmative misrepresentations);

b. Plan administrators should correct misleading statements contained in documents provided upon request when it is clear that the statements which were once accurate and informative have now become misleading;

c. Plan administrators should provide complete and accurate information relevant to the participant or beneficiary's specific circumstances when the participant or beneficiary requests information about his or her benefits;

d. Plan administrators should provide complete and accurate information relevant to the participant or beneficiary's specific circumstances when the participant or beneficiary inquires about future plan changes;

e. Plan administrators should disclose characteristics of the plan and of those who provide services to the plan, if that information affects beneficiaries' material interests.

3. What practical factors should the Department consider in developing a general policy or interpretive approach to provide guidance concerning what disclosures are required of plan fiduciaries, beyond those required by Part 1 of Title I, and the relationship between a fiduciary's duties under Part 4 and Part 1?

4. To what extent would changes have to be made to plan administration in order for plans to meet any or each of the standards set out in question 2, above?

5. Should any guidance issued by the Department on fiduciary disclosure obligations take into consideration State regulatory requirements, or other federal regulatory requirements (*e.g.,* securities laws, consumer protection laws, etc.)? If so, which requirements?

Data

6. What costs and benefits for plan sponsors and participants would be associated with modifying plan administrative practices regarding disclosure to meet each of the possible standards described in question 2, above?

7. To what extent do the costs and benefits associated with modifying administrative practices to meet the possible standards described in question 2, above, differ among plans that are fully insured, administered by third parties, or self-administered?

8. Are the costs and benefits for plan sponsors and participants of modifying administrative practices to meet the possible standards described in question 2, above, different for small plans (those with fewer than 100 participants)?

9. To what degree is the timing of disclosures about plan modifications related to the timing of routine communications with employees, such as furnishing employee newsletters, open-season informational packets, or individual account statements?

10. What costs and benefits might arise for plan sponsors and participants from additional guidance on fiduciary disclosure obligations, and how might these costs and benefits differ for small plans?

Hypothetical Fact Patterns

11. A plan sponsor modifies the benefits provided under a plan to comply with recently enacted federal benefit requirements. How and when do plan fiduciaries currently inform participants of these changes?

12. A plan subject to new federal benefit requirements has not yet been brought into compliance with the new federal requirements. The plan materials (such as the SPD) also have not yet been updated to reflect the changes, nor has the plan issued any notices advising plan participants of the changes in the law. The plan administrator is aware that the law affecting the plan has changed and that the plan is not yet in compliance. A participant, unaware of the new law, calls to ask whether the plan provides benefits that are mandated under the new requirements. What do plan administrators do in these circumstances?

13. A participant has requested information about the value of the retirement benefit that he will have earned upon attaining a certain age. The plan administrator is aware that the retirement benefit would have a much greater value as an annuity versus a lump sum amount. The plan administrator is aware that the

Cir. Aug. 10, 2000) (holding that in response to participant inquiries a fiduciary must disclose information about any plan changes then under serious consideration. Absent such inquiry, fiduciaries have no obligation to volunteer information about plan changes prior to final adoption.); *Vartanian* v. *Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997) (employer had no fiduciary duty to disclose retirement incentive program because it was not yet under serious consideration at the time of participant's inquiry); *Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (3rd Cir. 1996) (the ''serious consideration'' test ''recognizes and moderates the tension between an employee's right to information and the employer's need to operate on a day-to-day basis;'' serious consideration found when ''(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change''), *cert. denied*, 520 U.S. 1116 (1997).

[17] *Ehlmann*, 198 F.3d at 555; *CWA/ITU Negotiated Pension Plan* v. *Weinstein*, 107 F.3d 139 (2nd Cir. 1997) (no right to disclosure of pension plan's actuarial valuation reports); *Faircloth* v. *Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996) (no right to disclosure of IRS determination letter on plan's qualification status, bonding policy insuring ESOP against fiduciary misconduct, appraisal reports, or valuation reports of employer's stock and documents concerning employer's financial status and operations; funding and investment policy for plan treated differently as ''instrument under which the plan is established or operated''), *cert. denied*, 519 U.S. 1077 (1997); *Barnes* v. *Lacey*, 927 F.2d 539 (11th Cir.) (no right to disclosure, in connection with company's offering early retirement window plan, of possibility that company might later offer second, enhanced window plan), *cert. denied* 502 U.S. 938 (1991).

[18] The Department has expressed its views in specific circumstances, including submitting amicus briefs in *Varity* v. *Howe* and *Shea* v. *Esensten*.

retirement benefit would have a much greater value at a date earlier than the normal retirement age due to early retirement benefits. What information do plan administrators currently provide to participants under these circumstances?

14. Employer A sells its business to Employer B and cancels its group health insurance, which had been provided through Issuer C. Employer B's group health plan will not absorb all of the former employees of Employer A. Employer A's plan offers conversion rights to the individual market, but neither Employer A's plan materials nor Issuer C's materials disclose this conversion right. Employee D, formerly a participant in Employer A's now-defunct plan, needs continuous, expensive treatment for a serious health condition which was covered by Employer A's plan and calls Issuer C to ask about conversion rights. What information do plan fiduciaries acting in capacities similar to Issuer C currently provide to an employee like Employee D?

15. An employer is considering selling part of its business or instituting retirement incentives to reduce its labor costs. How, when, and to whom do fiduciaries currently disclose an employer's deliberations regarding retirement incentives?

16. An employer is considering instituting a change to its defined benefit pension plan that would significantly change the value of the benefit, or reduce the value of the benefit upon attaining a certain age. How, when and to whom should the fiduciary of the employer's pension plan disclose the employer's deliberations regarding the changes to the benefit plan? What information do plan fiduciaries currently disclose to plan participants and beneficiaries in these circumstances, and when is this disclosure made?

17. An employer offers an early retirement program for Pension Plan F, and Plan F issues booklets providing an overview of the retirement program to all eligible employees. The booklet purports to highlight the ''basic federal tax rules'' relevant to the choice between taking the pension benefits in a lump sum or in a series of monthly installments. The booklet does not say that only qualified portions of the lump sum distributions may be rolled over to another qualified plan or IRA without being taxed and that the rest of the distribution will be taxed. The plan materials describe the basic rule that qualified portions of a lump sum distribution may be rolled over tax-free, but do not explain what ''qualified'' means and who will be affected by this distinction. Would fiduciaries currently consider the information provided in these plan materials sufficient, and, if not, what additional information do fiduciaries currently provide, when, and to whom?

18. An employer has failed to meet its obligation to pay for premiums on behalf of its employees for an insured health plan which could lead to a suspension of benefit payments or a termination of the policy. What disclosures are currently made by the insurer to plan participants under such circumstances and when are they made?

All submitted comments will be available for public inspection and will be made a part of the public record of future guidance issued by the Department, in the event that the Department determines to issue future guidance on these matters.

Authority: 29 U.S.C. 1135, 1143; Secretary of Labor's Order No. 1–87, 52 FR 13139.

Signed at Washington, DC, this 8th day of September, 2000.

Leslie Kramerich,

Acting Assistant Secretary for Pension and Welfare Benefits.

[FR Doc. 00–23603 Filed 9–13–00; 8:45 am]

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