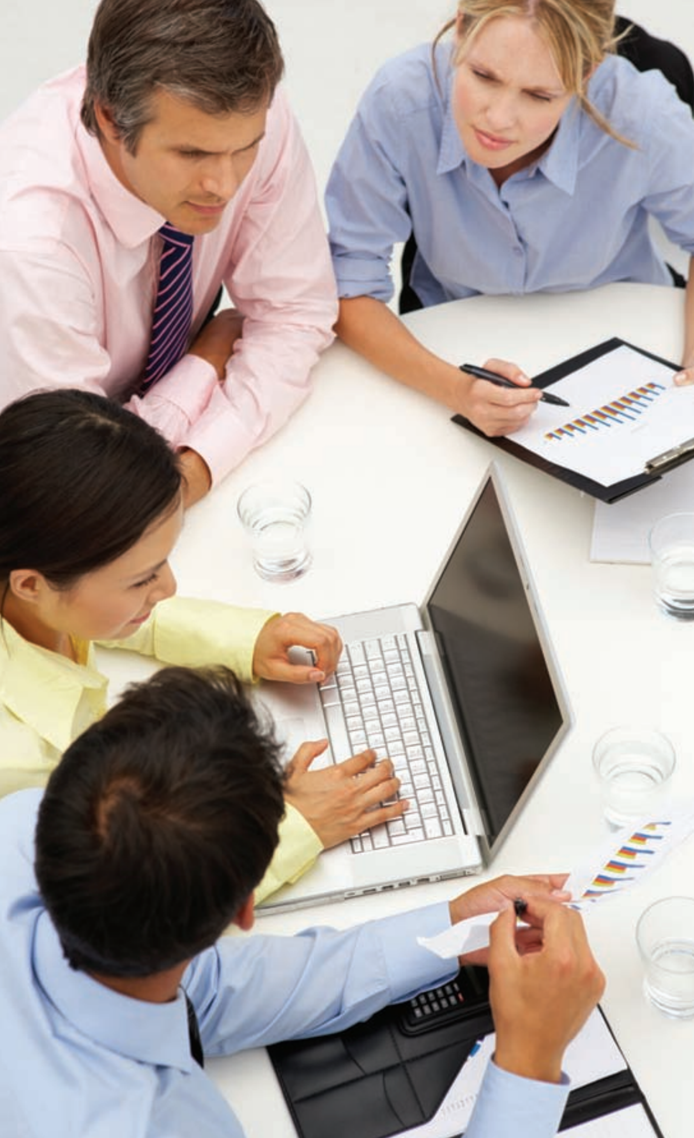

employee benefits update

april/may 2012

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Erroneous pension benefit estimate doesn't support ERISA estoppel claim

Take the right steps to terminate your 401(k) plan

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DOL releases electronic disclosure enforcement guidance

Last fall, the Department of Labor (DOL) released an interim enforcement policy regarding the use of electronic media to satisfy the disclosure requirements for participant-directed individual account plans. The guidance requires plan administrators to disclose to plan participants and beneficiaries both planwide and individual fees and expenses that the plan may charge against plan accounts. The guidance generally is effective beginning May 31, 2012.

Types of disclosures

Plan sponsors may include plan-related disclosures in a pension benefit statement and distribute them in the same manner that they distribute other information included in the same pension benefit statement. For example, if plan sponsors furnish pension benefit statement information through a secure continuous access website, they may furnish the information included as part of the pension benefit statement electronically in the same manner.

Participants and beneficiaries entitled to receive the disclosures must voluntarily provide an e-mail address for the purpose of receiving the required disclosures.

As for investment-related information, plan sponsors may provide it as part of, or along with, pension benefit statement information either electronically or in paper form.

If the plan sponsor doesn't electronically include either the plan- or investment-related information with the pension benefit statements, the administrator may use either the safe harbor method of delivery (see "Making a safe harbor disclosure" on page 3) or the new method specifically outlined in the DOL's release to ensure electronic delivery.

Making a disclosure under new guidance

Under the DOL guidance, the sponsor may provide plan- or investment-related information electronically if it satisfies all of the following provisions:

Voluntary provision of e-mail address. Participants and beneficiaries entitled to receive the disclosures must voluntarily provide the employer, plan sponsor or plan administrator with an e-mail address for the purpose of receiving the required disclosures.

Initial notice. The initial notice must be clear and conspicuous, provided at the same time and in the

Making a safe harbor disclosure

Under the safe harbor method of disclosure, the Department of Labor (DOL) permits electronic disclosures if they're furnished using measures reasonably calculated to ensure that the system furnishing the information actually delivers the information. It must disclose the information in a manner consistent with the style, format and content of the applicable document, while also protecting the confidentiality of the recipient's accounts and benefits.

The recipient must receive an electronic document with a notice that describes the document's significance and informs the individual that he or she has a right to request the information in paper form.

In addition, the safe harbor applies only to information furnished either to a participant who can access electronic documents where he or she is reasonably expected to perform work and uses the electronic information system as an integral part of his or her work duties, or any individual who affirmatively consents to receiving disclosures electronically according to the safe harbor's consent provisions.

same medium as the request for the e-mail address. It must contain specific information — including, but not limited to, a statement indicating that providing an e-mail address for the receipt of the required disclosures is entirely voluntary and that, as a result of providing the e-mail address, the required disclosures will be made electronically. The initial notice may also include a statement that the participant or beneficiary has the right, at any time, to opt out of receiving the information electronically and an explanation of how to exercise that right.

The initial notice may be sent to the e-mail address already on file with the employer, plan sponsor or plan administrator, provided the individual has interacted electronically with the plan within 12 months prior to furnishing the notice. Initial notices made in this way must be furnished no earlier than 90 days and no later than 30 days before the initial disclosures are required.

Annual notice. Plan sponsors must provide an annual notice containing a brief description of the information that will be furnished electronically and how it can be accessed, along with an explanation of the procedure for updating the participant's or beneficiary's e-mail address. If the individual has interacted electronically with the plan at any time after the previous year's annual notice, the notice can be e-mailed to the individual. Otherwise, it must be on paper.

Delivery. The plan administrator must take appropriate measures to reasonably ensure that the electronic delivery system results in actual receipt of the information. This can be accomplished by using return receipt or notice of undelivered e-mail features, or by conducting periodic survey reviews.

Confidentiality. The plan administrator must take appropriate measures to reasonably ensure that the electronic delivery system protects the confidentiality of personal information.

Calculated to be understood. Notices furnished to participants and beneficiaries must be written in a manner that can be understood by the average plan participant.

It's all electric

Electronic disclosure notices can be cost-effective and efficient, but it's important to deliver them correctly. Following the steps outlined in the DOL guidance will ensure compliance with the DOL's enforcement policy.

Upcoming compliance deadlines:

4/15 Deadline for corrective distribution of 2011 excess deferral failures

4/17* Deadline for filing of 2011 individual and/or partnership tax returns and making contributions eligible for deductibility

5/15 Deadline for filing 2011 Form 990, "Return of Organization Exempt From Income Tax"

** The IRS announced that the normal April 15 deadline would be extended to April 17 this year, to allow for observance of a District of Columbia holiday.*

What investment advice can you give?

FINAL RULE ON 401(K) INVESTMENT ADVICE NOW IN EFFECT

The Department of Labor (DOL) issued a final rule clarifying how investment advisors working with plan sponsors can provide investment advice to retirement plan participants in a way that protects both the participant and the investment advisor.

According to the DOL, the investment advice rule assists fiduciaries in making sure they're providing quality, unbiased investment advice to 401(k) participants. The final rule affects sponsors, fiduciaries, participants and beneficiaries of participant-directed individual account plans, as well as providers of investment and investment-advice-related services to such plans.

PPA exemption

Both the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC) prohibit fiduciary investment advisors from obtaining compensation from recommendations to

plan participants and IRA holders. During the past several years, the DOL has issued various forms of guidance concerning when a person would be a fiduciary by reason of rendering investment advice, and when such investment advice might result in prohibited transactions.

Responding to the need to afford participants and beneficiaries greater access to professional investment advice, the Pension Protection Act of 2006 (PPA) amended the prohibited transaction provisions of ERISA and the IRC. The amended provisions permit a broader array of investment advisors to offer their services to participants and beneficiaries responsible for investing assets in their individual accounts and, accordingly, for the adequacy of their retirement savings.

To take advantage of the PPA exemption, investment advisors must:

- Provide the investment advice based on a computer model certified as unbiased and as applying generally accepted investment theories, or
- Be compensated on a "level-fee" basis, meaning that the fees received by the advisor (and his or her employees, agents and registered representatives) from any party (including affiliates of the advisor) may not be based on the investment selected by the participant.

The final rule clarifies how this exemption works.

Clarifying the exemption

A plan fiduciary or any other party isn't required to offer, provide or make available investment advice to a participant or beneficiary. To guarantee the protection of investment advisors and participants, a plan fiduciary must comply with numerous conditions.

For example, a plan fiduciary (independent of the investment advisor or its affiliates) must authorize the investment advice arrangement and satisfy certain recordkeeping requirements. Plan sponsors continue to have fiduciary responsibility in selecting and monitoring an investment advisor, but aren't responsible for the advice given to participants.

The final rule mandates that an independent expert certify in writing and in advance any computer models as unbiased and meeting the exemption's requirements. The plan sponsor must establish qualifications and a selection process for the independent expert who will perform this certification. The plan fiduciary must ensure that a "level-fee" requirement doesn't allow investment advisors (or their employees) to receive compensation from any party on the basis of investments selected by participants.

In both computer models and level-fee arrangements, the entity providing advice must ask participants about their age, life expectancy, retirement age, risk tolerance and investment preferences, current investments, and other assets and sources of income. In addition, the fiduciary must establish an annual audit of both the computer model and level-fee arrangement, including the requirement that the auditor be independent from the investment advice provider. The final rule also requires advisors to provide specific disclosures to plan participants, such as past performance and historical rates of return of the available investment options and that a recipient of the advice may separately arrange for advice by another advisor.

Benefits and costs of final rule

The final regulation should help plan participants obtain quality financial advice, which may lead to fewer investment mistakes. The DOL believes that, after receiving advice, participants may pay lower fees and expenses, engage in less risky trading, diversify their portfolios more effectively, and avoid excess taxes.

Estimated future costs include those for preparing and distributing disclosures to plan participants and beneficiaries. Other costs may include authorizing plan fiduciaries, hiring independent auditors to audit these investment advice arrangements and enlisting eligible investment experts to certify the computer models used by the advisors to produce investment options.

No time to lose

The final rule doesn't affect the DOL's prior guidance on the application of prohibited transaction rules and existing prohibited transaction exemptions to investment advice arrangements. The final rule took effect Dec. 27, 2011, and applies to transactions taking place on or after that date.

Erroneous pension benefit estimate doesn't support ERISA estoppel claim

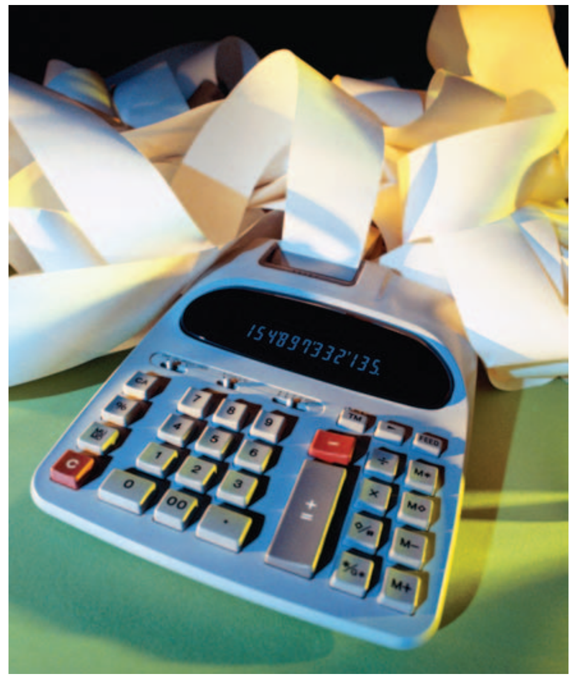
In *Pearson v. Voith Paper Rolls, Inc.*, the U.S. Court of Appeals for the Seventh Circuit affirmed that an erroneous estimate of a participant's pension benefits couldn't support an Employee Retirement Income Security Act (ERISA) promissory estoppel claim against the pension plan. While this was good news for the plan, it's also a reminder of the importance of providing accurate information to retirement plan participants.

The facts

Voith Paper Rolls terminated Kenneth Pearson's employment after 14 years. During severance negotiations, Voith's human resources manager provided Pearson with five options for his benefit payments: One was a lump sum and the other four were different variations of payments over time. The lump sum option's amount was correct, but the other four overstated Pearson's benefits.

A promissory estoppel claim under ERISA requires a knowing misrepresentation in writing by the plan.

Pearson signed the severance agreement with the understanding that he would receive a pension benefit in excess of $1,150 per month. The company double-checked its calculations after receiving Pearson's election form and realized it had made an error in the calculations. The company recalculated the benefits and sent Pearson a new election form with the corrected numbers. The numbers for the option that Pearson had chosen dropped about $450



a month. Pearson then filed suit against the plan for promissory estoppel. Under this legal theory, the courts will enforce an agreement that doesn't meet the legal requirements of a contract because one party has relied on the promise of the other and it would be unfair not to enforce the agreement.

The case

To prevail on a promissory estoppel claim under ERISA, a plaintiff must ordinarily show that a knowing misrepresentation was made in writing and the plaintiff reasonably relied on that representation to his or her detriment. In this case, the trial court found in favor of the plan, concluding that Pearson couldn't show a knowing misrepresentation, detrimental reliance or economic harm. The court also concluded that any misrepresentation was made by the company, not the plan. Pearson appealed.

The Seventh Circuit agreed with the trial court, reasoning that there was no evidence of the plan's intentional misrepresentation. The court reasoned that the company may have had an incentive to overstate the pension to negotiate a better severance package, but the plan didn't have the same incentive. The court also found it unreasonable to believe that the company would overstate four of the five options given to Pearson, when it didn't know which option Pearson would choose.

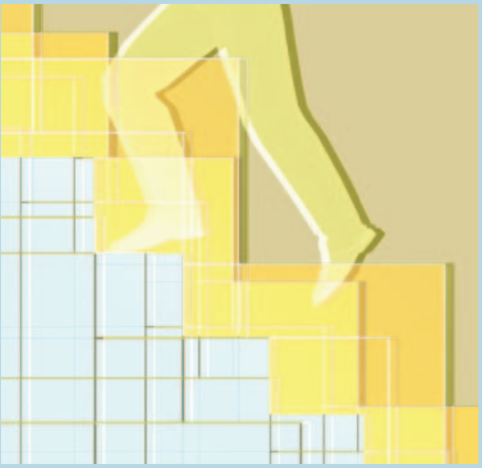
The court reiterated that a promissory estoppel claim under ERISA requires a knowing misrepresentation in writing by the plan, which Pearson failed to prove. At best, the evidence showed negligence, which isn't enough for a knowing misrepresentation.

The court also couldn't find evidence of detrimental reliance, which requires economic harm to the plaintiff. Pearson testified that he didn't want to rescind and renegotiate his original severance package, supporting the speculative nature of any economic harm.

Get the numbers right

The court held that Pearson couldn't prove that the retirement plan had knowingly misrepresented the terms of the pension to him. While the plan won the case, the real lesson to be learned is the importance of providing accurate information to participants. Had that been done, the plan would have saved itself litigation costs.

Take the right steps to terminate your 401(k) plan



If an employer decides to terminate its 401(k) plan, it must do so properly. If not, it could find itself facing steep consequences or even being sued by the Department of Labor.

Employers can terminate their 401(k) plans at any time and at their discretion. To terminate the plan, they must complete certain steps.

First, a plan sponsor must establish the plan termination date and provide timely notice of the plan termination to all interested parties. This includes present employees with accrued benefits, former employees with vested benefits and beneficiaries of deceased former employees who receive benefits. The plan sponsor must also freeze future plan benefits.

A plan must be in compliance with current laws and regulations at the time of termination. Also, the plan must adopt IRS interim amendments and correct plan violations before termination. The plan administrator must determine the benefits and liabilities under the plan as of the plan termination date.

The next step is to distribute all plan assets as soon as administratively feasible, generally within one year after the date of the plan termination. All affected participants are fully vested in their account balance on the date of plan termination.

Finally, the employer must file the proper IRS forms. The plan sponsor must file a final Form 5500, notifying the IRS that the plan is terminating. In addition, the plan administrator should file Form 5310 asking the IRS to review the plan and issue a determination letter on the plan's qualified status at the time of termination. Be aware that Form 5310 isn't a required filing.

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  - ESOPs and ownership succession planning and implementation
  - Assisting fiduciaries to reduce liability and comply with legal requirements
  - Transitioning benefit plans in mergers and acquisitions
- Tax and Business Planning/Corporate and Business Representation
- Business Mergers and Acquisitions
- Tax and Regulatory Dispute Resolution
- Trusts, Estate Planning and Probate
- Corporate and Individual, Domestic and International Taxation
- Acquisitions and Sales of Businesses/Ownership Succession
- Entity Formation and Counseling, including non-profits and private foundations

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MISSION STATEMENT:

M&J is committed to continuing its tradition of delivering personalized legal services by working together to provide effective solutions for its clients.

W. Terence Jones has over 30 years experience in benefits and corporate matters. He received his B. A. from Yale University and received his law degree cum laude and a Master in Laws (in Taxation) from Boston University School of Law. He may be reached at **tjones@maselanjones.com** or 617-310-6565.