

An Obligation for Education

Do fiduciaries have an obligation, or legal duty, to educate employees about participation in deferral-based retirement plans, like 401(k)s and 403(b)s?

By [Fred Reish](#)

YES, BUT the full extent of the obligation is not clear. ERISA requires that fiduciaries provide employees with information about eligibility and participation in their plans. For example, employees must be provided with summary plan descriptions (SPDs) on a timely basis. Further, if employees are not timely informed of the opportunity to participate, the plan may have a disqualifying defect under the Internal Revenue Code.

In addition, fiduciaries have a duty to prudently select and monitor their service providers, including their providers of investment education, communications, and enrollment services. Properly done, the selection and monitoring focus on both the quality and the effectiveness of the services. Are the communications and enrollment services really working? If not, changes need to be made.

I suspect that most plan sponsors and fiduciaries believe that their duties are limited to employees who decide to defer into the plan. However, ERISA's fiduciary requirements are more complicated than that. For example, the duties also extend to former employees who continue to have account balances in the plan. Additionally, there is a DOL regulation that defines "participants" in deferral-based plans as including any employee who satisfies the plan's eligibility requirement (see DOL Reg. §2510.3-3(d)). By definition, that includes even eligible employees who have never deferred into the plan.

Since ERISA's fiduciary responsibilities are owed to "participants," the DOL regulation has the effect of extending the fiduciary's duties to eligible employees who do not defer and who do not have account balances in the plan.

What does that mean in terms of the responsibilities of fiduciaries? Unfortunately, there is no easy answer to that question. As a result, I recommend that plans operate in a way that creates a fiduciary moat. By "moat," I mean that fiduciaries should operate with a margin of safety-because the law is not clear. They should anticipate the possible duties that could be owed to the non-deferring eligible employees and should fulfill those responsibilities to the best of their ability.

In terms of what should be done, I think it is possible-or even probable-that the law will be interpreted to require ongoing periodic communications with those employees about the importance of accumulating retirement benefits, the eligibility provisions of the plan, and the matching contributions that are available. In addition, plan changes and enhancements should be communicated to those participants who are not active in the plan. Those services and investments may help some eligible (but not deferring) employees to decide to defer into the plan.

Since there are no specific rules about what should be communicated to those employees, there is obviously no guidance on the timing of the communications (other than the rules regarding the distributions of SPDs and statements of material modifications (SMMs)). However, I believe that a regular annual program of reaching out to that group would be adequate under the current state of the law.

As an alternative to communication programs, employers could consider automatic enrollment. Automatic enrollment-if it also is applied to employees who previously were eligible to defer, but did not do so-would have the effect of requiring that an eligible employee affirmatively elect not to participate in the plan, thereby effectively relieving the fiduciaries of much of the responsibility for communicating with and educating the eligible employees who are not deferring. Even with that,

though, the employees who elected to not defer in an automatically enrolled plan still would be considered participants under the regulation, though it is difficult to imagine that there would be significant expectations placed on the fiduciaries in that case. Fiduciaries could achieve a similar result by requiring that all eligible employees complete and return an enrollment form, even if they were electing not to defer.

All in all, the obligations of fiduciaries to non-deferring employees are probably greater than generally thought. However, once that responsibility is acknowledged, the burden of compliance is not that great.

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Mike Warson
Managing Partner
Northgate Benefits
415.499.1764
www.northgatebenefits.com