



# WRMarketplace

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**TOPIC:** ERISA Fundamentals – Reporting and Disclosure: What Everyone Should Know

**MARKET TREND:** ERISA compliance initiatives continue to rise. As most employers maintain either defined contribution or defined benefit plans that are subject to ERISA, plan administrators need to be aware of their obligations.

**SYNOPSIS:** ERISA's reporting and disclosure requirements are intended to give plan participants adequate information about the plans in which they participate. These requirements cover such things as descriptions of plan provisions, information about a plan's financial status, and information relevant to the employee's investment decisions concerning their plan accounts (in defined contribution plans that allow participant investment direction).

**TAKE AWAYS:** Plan administrators need to review their processes for providing the ERISA-required periodic and interim disclosures to ensure compliance. Failure to comply with these requirements can expose the plan administrator to potentially exorbitant monetary penalties or can cause the plan fiduciaries to lose their protection against fiduciary responsibility in plans that allow participants to direct the investment of their accounts.

In addition to the plethora of substantive rules governing the operation of employee benefit plans, ERISA imposes significant reporting and disclosure obligations on the administrators of these plans, arguably to enable participants to protect their interests under the plans. The following summarizes the principal disclosure and reporting obligations that are imposed periodically on pension plans, both defined contribution and defined benefit arrangements.<sup>1</sup>

## ***DISCLOSURE REQUIREMENTS***

**Plan Document.** Every plan subject to ERISA must be maintained pursuant to a written plan document.

***What information must it contain?*** ERISA and the applicable regulations do not specify the content of a plan document for a retirement plan. There are certain required provisions of welfare benefit plans that constitute group health plans that relate to compliance with other laws such as COBRA and HIPAA. Generally, however, the plan document should be considered as a contract between a plan sponsor and the participants in the plan. Thus, the plan document should be carefully drafted to clearly articulate the rights and obligations of the participants and the plan sponsor.

***To whom does it need to be provided?*** A copy of the plan document needs to be provided to plan participants and beneficiaries who request a copy of the document.

***When does it need to be provided?*** The copy of the plan document must be provided within 30 days of the date on which the document is requested.

***What are the penalties for failure to provide it?*** There is no specific penalty for the failure to have a plan document, but a court or the Department of Labor (“DOL”) can impose a penalty of up to \$110 per day against a plan administrator that does not promptly provide a copy of the plan document following a request.

**Summary Plan Description.** Every plan subject to ERISA must have a summary plan description (“SPD”), which, in contrast to the formal plan document, is a document drafted in language that is intended for the average participant readily to understand.

***What information must it contain?*** Unlike for plan documents, ERISA regulations contain extensive requirements for the contents of an SPD. Specifically, among other things, an SPD must include:

- A description of the plan's rules for eligibility and the receipt of benefits;
- A statement identifying circumstances under which a participant or beneficiary might forfeit or otherwise have his or her right to plan benefits reduced;
- A description of any joint and survivor benefits provided under the plan;
- A summary of any plan provisions that govern when the plan can be amended or terminated and the consequences of an amendment or termination;
- A description of the plan's contribution or funding policy;
- A description of the claims process under the plan and for appealing any denial of such a claim;
- Specific plan identifying information (such as the plan number and the plan's agent for service of legal process); and
- A statement of a participant's rights under ERISA.

***To whom does it need to be provided?*** A copy of a plan's SPD must be provided to plan participants and beneficiaries.

***When does it need to be provided?*** The SPD must be provided within 120 days of the adoption of a new plan, within 90 days of enrollment of a new participant, and within 30 days of a participant or beneficiary's written request. An updated SPD must be prepared every five years (or every ten years if no material amendments have been made to the plan).

***What are the penalties for failure to provide it?*** There is no specific penalty for failure to have an SPD, but a court or the DOL can impose a penalty of up to \$110 per day against a plan administrator that does not promptly provide a copy of the SPD following a request.

**Summary of Material Modifications.** If a plan is amended to materially change its terms or in such a way as to require a change to the information in the SPD, the plan administrator must prepare a summary of material modifications ("**SMM**").

***What information must it contain?*** The SMM must accurately describe the change in the plan's provisions.

***To whom does it need to be provided?*** A copy of the SMM needs to be provided to plan participants and beneficiaries, though a timely-distributed, updated SPD will satisfy the SMM requirement.

***When does it need to be provided?*** Generally, an SMM must be provided within 210 days after the end of the plan year in which the relevant plan change was adopted.

***What are the penalties for failure to provide it?*** There is no specific penalty for a failure to prepare and distribute an SMM, but a court or the DOL can impose a penalty of up to \$110 per day against a plan administrator that does not promptly provide a copy of the SMM following a request.

**Summary Annual Report.** Plan administrators that are required to file an annual report on Form 5500 (discussed below), other than defined benefit pension plans, are required to distribute a narrative summary of the salient contents of the Form 5500.

***What information must it contain?*** The summary annual report (“SAR”) must include funding and insurance information, basic financial information, and a statement that participants have the right to request a copy of the full annual report.

***To whom does it need to be provided?*** A copy of the SAR needs to be provided to plan participants and beneficiaries receiving benefits.

***When does it need to be provided?*** The SAR needs to be distributed within nine months after the end of the plan year to which it relates, or two months after the due date for filing the Form 5500, if an extension was requested.

***What are the penalties for failure to provide it?*** A court can impose a penalty of up to \$110 per day against a plan administrator that does not comply within 30 days.

**Annual Funding Notice.** In lieu of an SAR, the plan administrator of a defined benefit pension plan must distribute an annual funding notice.

***What information must it contain?*** The annual funding notice must contain basic information about the status and financial condition of the plan, including the plan’s funding percentage, assets and liabilities, and a description of the benefits guaranteed by the PBGC.

***To whom does it need to be provided?*** The annual funding notice must be provided to plan participants, beneficiaries receiving benefits, each labor organization representing participants under the plan, each employer that has an obligation to contribute under the plan, and the PBGC.

***When does it need to be provided?*** The annual funding notice must be provided not later than 120 days after the plan year (for large plans). Small plans (100 or fewer participants) must furnish the notice no later than the earlier of the date on which the annual report is filed or the latest date the annual report must be filed (including extensions).

***What are the penalties for failure to provide it?*** There is no specific penalty for failing to provide an annual funding notice, but a court can impose a penalty of up to \$110 per day per affected individual against a plan administrator that does not promptly provide a copy within 30 days of the due date or the date of a request.

**Periodic Pension Benefit Statement.** Every retirement plan must provide a periodic statement of plan benefits.

***What information must it contain?*** The content of the statement depends on the type of retirement plan, but all statements must indicate total benefits and total nonforfeitable benefits, if any, that have accrued or the earliest date on which the benefits become nonforfeitable.

For an individual account plan, the statement also must provide the value of each investment to which assets in the individual account have been invested. If the plan participant can direct the investment of his or her plan assets, the statement also must include an explanation of any limitation or restriction on any right of the participant or beneficiary to direct an investment, an explanation of the importance of a well-balanced and diversified portfolio (including a statement of the risk that holding more than 20% of a portfolio in the security of an entity (such as employer securities) may not be adequately diversified), and a notice directing the participant or beneficiary to the DOL website for sources of information on individual investing and diversification.

***To whom does it need to be provided?*** A periodic benefit statement must be provided to all plan participants and beneficiaries.

***When does it need to be provided?*** The statement must be provided at least once each quarter (within 45 days) for individual account plans that allow participant direction of investment, at least once a year (by Form 5500 due date) for individual account plans that do not provide for participant direction, and once every three years for defined benefit plans, unless the plan administrator provides an annual notice that the statement can be obtained upon request.

***What are the penalties for failure to provide it?*** There is no specific penalty for failing to provide a periodic benefit statement, but a court or the DOL can impose a penalty of up to \$110 per day per affected individual against a plan administrator that does not promptly provide a copy within 30 days of the due date or the date of a request.

**Section 404(c) Plan Disclosures.** If an individual account plan offers participants the right to direct the investment of their accounts and the plan fiduciary wants to be shielded from liability for losses resulting from a participant's investment choices, the plan administrator must provide certain notice to participants and beneficiaries.

***What information must it contain?*** The notice must advise the participant or beneficiary that the plan is intended to be an ERISA §404(c) plan, and that plan fiduciaries may be relieved of liability for any losses that are the direct and necessary result of investment instructions given by the participant or beneficiary. The notice must also include information about plan investments, fees, and expenses.

***To whom does it need to be provided?*** A copy of the notice needs to be provided to plan participants and beneficiaries.

***When does it need to be provided?*** The notice needs to be distributed in sufficient time to give the participant or beneficiary a reasonable opportunity to make informed decisions about investment options.

***What are the penalties for failure to provide it?*** There are no monetary penalties for failure to provide this notice. Rather, the plan fiduciaries will retain liability for losses resulting from imprudent participant investment direction.

**Qualified Default Investment Alternative Notice.** Generally, if a plan is structured to allow participant direction of the investment of plan assets in a manner that absolves the plan fiduciaries of liability for losses resulting from the investment directions, the plan fiduciaries need to designate a "qualified default investment alternative" ("QDIA")

into which assets where no investment direction has been provided by the participant will be invested. If properly chosen, the QDIA will shelter the fiduciaries from losses resulting from the investment of participants' assets in that investment. Participants and beneficiaries need to be notified about the existence and meaning of the QDIA.

***What information must it contain?*** The notice must advise the participant or beneficiary of the circumstances under which contributions or other assets will be invested in a QDIA on their behalf, the QDIA's investment objectives, and participants' and beneficiaries' rights to direct the investment of assets out of the QDIA.

***To whom does it need to be provided?*** A copy of the notice needs to be provided to plan participants and beneficiaries on whose behalf an investment in a QDIA may be made.

***When does it need to be provided?*** The notice needs to be distributed at least 30 days in advance of plan eligibility, or at least 30 days in advance of the date of any first investment in a QDIA on behalf of a participant or beneficiary, or on or before the date of plan eligibility if the participant has the opportunity to make a withdrawal within the first 90 days. In addition, there is an annual notice requirement within a reasonable period of at least 30 days in advance of each subsequent plan year.

***What are the penalties for failure to provide it?*** There are no monetary penalties for failure to provide this notice. Rather, the plan fiduciaries will retain liability for losses resulting from imprudent investment in the QDIA.

**Participant Plan and Investment Fee Disclosures.** For individual account plans that allow participant direction of their account assets, a plan administrator must provide fairly extensive information about the administrative and investment costs of participation in the plan.

***What information must it contain?*** The disclosure must include general information about the mechanics and structure of the plan, such as how to give investment directions, and information about the plan's administrative costs (such as recordkeeping and investment advice) and individual charges that may be assessed to participants (such as for loans or qualified domestic relations orders (or "QDROs")). The disclosure must also include a current list of the plan's investment options and any brokerage windows, and must disclose investment-related information about each investment option – in comparative format – including performance data benchmark

information, fee and expense information, internet website address, and a glossary of terms.

***To whom does it need to be provided?*** This disclosure needs to be provided to plan participants and beneficiaries with the authority to direct their own investments.

***When does it need to be provided?*** General information about the plan and potential administrative and individual costs, as well as a comparative chart of key information about plan investment options, must be provided on or before the date participants can first direct their investments and annually thereafter. This information may be included in the plan's SPD if the SPD is distributed within the requisite time frames. Information about actual fees charged to or deducted from accounts must be provided quarterly and may be included in quarterly benefit statements.

***What are the penalties for failure to provide it?*** There are no monetary penalties for failure to provide this notice. Rather, the plan fiduciaries will retain liability for losses resulting from imprudent investment of participants' accounts.

## **REPORTING REQUIREMENTS**

**Annual Report (Form 5500)**. With limited exception, each employee benefit plan subject to Title I of ERISA must file an annual report. The principle exceptions are for welfare benefit plans with fewer than 100 participants at the beginning of the plan year, and SEP and SIMPLE retirement plans (but see discussion below concerning exceptions for certain unfunded deferred compensation plans).

***What information must it contain?*** The annual report is fundamentally a statement of the plan's assets and liabilities at the beginning and end of the year, as well as an income statement that shows the income and expenses of the plan during the plan year. The plan administrator also must answer certain questions concerning the operation of the plan for the plan year. Further, depending on the details of the plan's funding or operations, the plan administrator may need to complete additional schedules providing insurance information, actuarial information (for defined benefit pension plans), and information concerning payments of compensation to plan service providers. In addition, for pension plans (defined benefit and defined contribution arrangements) with at least 100 participants, the financial statements of the plan must be audited by an independent accountant.

***To whom does it need to be provided?*** The annual report is filed with the DOL electronically through its EFAST2 processing system.

***When does it need to be provided?*** The annual report is generally due on the last day of the seventh month following the end of the plan year (*i.e.*, July 31 for calendar year plans). An extension of up to 2-1/2 months (3-1/2 months for plan years beginning after December 31, 2015) can be requested.

***What are the penalties for failure to provide it?*** Failure to file an annual report timely can subject the plan administrator to a penalty of up to \$1,100 per day for failure to file a complete and accurate report. The DOL, however, maintains a program for delinquent filers whose delinquency has not been discovered by the DOL or the IRS to file late returns at greatly reduced penalties.

### ***IMPORTANT EXEMPTION FOR CERTAIN DEFERRED COMPENSATION PLANS***

Employers maintaining unfunded plans primarily for the purpose of providing deferred compensation for a select group of employees (*i.e.*, a so-called “top-hat plan”) may be exempt from the reporting and disclosure requirements of ERISA if it makes a filing with the DOL within 120 days after the establishment of the plan. The statement must include:

- The employer’s name, address and employer identification number (“EIN”);
- A declaration that the employer maintains a plan (or plans) primarily to provide nonqualified deferred compensation to a select group employees; and
- A statement of the number of plans and the number of employees in each plan.

If the employer fails to file this statement timely, it will be required to provide an SPD, SMMs, SARs, or annual funding notices (as the case may be) to plan participants and beneficiaries and to file a Form 5500 for each plan year.

### ***TAKE AWAYS***

Plan administrators need to review their processes for providing the ERISA-required periodic and interim disclosures to ensure compliance. Failure to comply with these requirements can expose the plan administrator to potentially exorbitant monetary penalties or can cause the plan fiduciaries to lose their protection against fiduciary responsibility in plans that allow participants to direct the investment of their accounts.

## DISCLAIMER

This information is intended solely for information and education and is not intended for use as legal or tax advice. Reference herein to any specific tax or other planning strategy, process, product or service does not constitute promotion, endorsement or recommendation by AALU. Persons should consult with their own legal or tax advisors for specific legal or tax advice.

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<sup>1</sup> Additional event-based reporting and disclosure requirements apply but are beyond the scope of this *WRMarketplace*.