Document "Ed"

Customize your plan document

MANY, and perhaps most, employers view their plan documents as little more than form language. However, it doesn't have to be that way—unless you have a form document that is prepared by your provider and has been pre-approved by the IRS. While small companies may need to use pre-approved documents because of cost considerations, mid-size and larger companies should consider drafting documents to meet their needs.

When my law firm is hired by a plan sponsor, one of our first steps is to review the plan documents. Over the years, we have developed a checklist for doing that. This article describes three of the items on the checklist.

Board of Directors' Approval—The plan sponsor should consider amending its plan to provide that the approval of the board of directors is required only for major amendments. Board approval would be needed only for amendments that: (i) terminate the plan; (ii) cease benefit accruals or contributions; (iii) materially increase the cost of the plan; or (iv) add provisions that otherwise significantly alter the company's rights, liabilities, and burdens with respect to the plan. Examples of amendments that would not require board approval are: (i) for tax qualification purposes; (ii) for administrative purposes; or (iii) that have a minor effect on the cost of the plan. Many plans require that the directors approve all plan amendments. That is not required by the law. In fact, it may be an inappropriate use of board time to deal with minor amendments. In addition, my experience is that the presentation of an issue to a board involves significant preparation and a fair amount of stress for the people involved. That is unnecessary if the plan document is properly worded.

Powers of the Fiduciaries—In order to ensure that fiduciaries are granted the broadest possible authority to interpret the plan and to determine eligibility for, and the amount of, benefits, the plan sponsor may want to add a provision to the plan to the effect that:

The fiduciaries shall have the sole and absolute discretion to interpret and administer the plan; to determine eligibility for benefits, including the amount of benefits; and to decide all questions that may arise or that may be raised under this plan. The decisions of the fiduciaries shall be binding upon all persons to the maximum extent permitted under ERISA.

I am surprised by the number of plan documents that do not include the language needed to give fiduciaries—usually the plan committee—the broadest authority to interpret the plan, determine eligibility for benefits, and decide questions related to the plan. If fiduciaries are given absolute discretion, their decisions will be protected to the greatest extent permitted by the law.

Beneficiary Designations—There are a handful of minor issues in the operation of 401(k) plans that have produced a disproportionately large amount of controversy and litigation. One of those issues is the payment of death benefits.

Plan sponsors should consider amending their plans to provide that, unless specifically stated otherwise in a qualified domestic relations order (QDRO), in the event of a final divorce decree, a prior beneficiary designation of the ex-spouse will be nullified.

Plan committees should review their plan language about designations of beneficiary and make sure that the plan personnel are following the procedures. For example, what happens to a beneficiary designation that is only partially completed? Does the language in the summary plan description accurately reflect the plan provisions?

For many provisions in your plan, you don't need to accept them as drafted. Most plan language has little to do with the tax code and ERISA. Instead, the person who drafted your plan made decisions about how it should be administered, but those decisions can and should be made by you. Take a look at your plan. See if it meets your needs.

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