BY
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IS YOUR PUBLIC SCHOOL DISTRICT EMPLOYER BEING TOLD IT'S A FIDUCIARY?

A basic primer to help you discuss with your plan sponsor clients whether they're fiduciaries for their 403(b) plans and how they can protect themselves from potential inaccurate information.

What is fiduciary responsibility? Does it apply to a public school district employer?

Fiduciary responsibility is contained in Employee Retirement Income Security Act (ERISA), which applies to the responsibility within retirement plans for employers that are not exempt from Title I of ERISA. Public education employers are exempt from ERISA under ERISA Section 3(32). There is no fiduciary exposure for them under ERISA.

THE INTERNAL REVENUE SERVICE

Final 403(b) regulations, effective on January 1, 2009, govern and set forth the compliance responsibilities for all employers sponsoring 403(b) plans. There is no reference to fiduciary responsibilities in those regulations. In fact, the IRS does not have the authority to impose fiduciary responsibilities on any employer.

STATE STATUTES

In most states, roughly 90 percent of them, the legislation authorizing public school districts to establish and maintain 403(b) plans does not impose fiduciary responsibility on those employers. Such responsibility wouldn't be applied under state trust laws because 403(b) assets aren't required to be held in trust, and those assets are generally not held in trust. Every public school district employer should ask its legal counsel to review the statutes in each particular state. You should be familiar with the statutes in your state and be prepared to offer copies of those statutes to employers.

STATE COMMON LAW

It's unlikely that state common law has any impact on public school districts in terms of their fiduciary obligations for the 403(b) plan. Obviously, an employer could be sued for a variety of reasons, based on misconduct or negligence, that would cause a 403(b) plan participant to suffer losses. However, this author is not aware of any such actions that are based on fiduciary issues.

WHY WOULD YOUR EMPLOYER CLIENTS BE TOLD THEY'RE A FIDUCIARY?

We've heard of public school district officials being informed by various entities that "you're a fiduciary," often coupled with, "but for a fee we'll help you manage your fiduciary liability responsibilities." This information is generally inaccurate because the entity simply hasn't done the homework necessary to verify its accuracy.

HOW CAN YOU HELP SET THE RECORD STRAIGHT?

If your employer clients are approached with that assertion, you can help protect them by recommending that they require the citations that cover their fiduciary liability exposure. You can even offer up the citations that you should have received from your benefits providers' legal counsel. You may often find that no such citations will be provided (because they may not exist). It's important for you to be aware that taking costly actions to protect against fiduciary obligations isn't in their best interest if those actions aren't required.

How should your employer clients select investment providers (and their products) to avoid the appearance of the assumption of fiduciary responsibility?

Remember that the IRS requires that employers and their providers share information for any and all transactions in the plan with the designated third-party administrator (TPA) unless the plan sponsor self-administers their plan. They should communicate with providers to be sure they've signed service provider/information sharing agreements confirming that they'll share the information and process transactions in order to meet those compliance requirements and obligations.

Once that's been confirmed by each current provider, they should be ready to meet the compliance requirements of the final 403(b) regulations. The TPA (if there is one) can and will help with this process. And the employer should be prepared to de-select any provider that cannot agree to share information to meet compliance requirements.

WORKING AND COMMUNICATING WITH EMPLOYEES

The long history of 403(b) plans in public school districts has been one of permitting employees to select their own investment provider(s) and appropriate product(s) for directing their voluntary retirement savings contributions. In some states, that ability is protected under state "open market" law, which has been updated to permit employers to work with multiple providers only to the extent they can and will comply with the information-sharing obligations

necessary for compliance. The need to de-select a specific provider that can't or won't share that information can be easily explained to "disenfranchised" employees as a measure to protect the tax status of their 403(b) accounts.

However, downsizing the number of providers based on the employer's perception of what constitutes low cost, low service investment and annuity options could, in fact, create exposure when employees aren't happy with the result of the choice. This is an unnecessary and potentially risky move for the employer and its governing board. It can be viewed as interference with the longtime relationships of the employees and their selected investment providers.

ACCOUNTS OF DE-SELECTED PROVIDERS

The accounts of providers de-selected on and after January 1, 2009, continue to be a part of the 403(b) plan as non-grandfathered orphan accounts. Employees holding those accounts may encounter difficulties when requesting transactions (such as loans or hardship withdrawals) unless the employer agrees to assume responsibility for determining eligibility for those transactions. Before de-selecting a provider on and after that date, the employer will want to be sure that the de-selected provider will continue to share information for those non-grandfathered orphan accounts promptly. Otherwise, those transactions may not be readily available to impacted employees.

As a 403(b) financial advisor, you should:

- Routinely call on employer clients to answer any questions they may have about their 403(b) plan. A perfect opportunity is to let the payroll staff know that the basic limits for their plan have increased for 2013 (as outlined in the *NTSAA Alert* and the *ASPPA asap*, posted the week of October 15, 2012).
- Establish yourself as the authority on the 403(b) plan. If you're seen as the go-to person, employers won't hesitate to share issues, so you'll know ahead of time about any contemplated changes.
- Arm yourself with knowledge about the statutes in your state. These actions should ward off 403(b) plan changes before they occur.

Ellie Lowder, TGPC, is a consultant with TSA Training & Consulting Services in Tucson, Ariz. This information is not intended to serve as tax or legal advice. Employers are urged to consult tax or legal professionals to confirm the information. Advisors are urged to ask the benefits providers to check the specific statutes in their states and to stay in close touch with their employer clients.