

To: Clients and Friends
From: Smith & Downey
Date: February 28, 2011
Re: Summary Plan Descriptions and Administrative Forms – The Rules and Recent Litigation

Many of our recent e-Alerts have covered the myriad of amendments needed for qualified retirement plans and all employee welfare benefit plans (especially health plans) to comply with recent legislation and regulations. Each of these amendments generally must be announced to employees and other covered individuals using an amended and restated Summary Plan Description (which describes the entire Plan in “easy to understand” terms and contains a list of specific information required by the SPD regulations) or a brief Summary of Material Modifications (which simply describes the changes made by the amendment to the plan).

These SPDs and SMMs can come from a variety of sources, including the sponsor of a prototype qualified retirement plan document, an insurer of plan benefits, or the benefits consulting firm or employee benefits lawyers for the plan.

A number of our clients have been struggling lately with the task of ensuring that their current SPDs and SMMs are consistent with the most recent terms of their plans (and the actual operation of the plans). This has become evident to us because more and more of the employee benefits controversy work (e.g., litigation and IRS/DOL audits) we are handling for clients deals with the provisions of the SPDs, SMMs, and administrative forms, including the failure of these employee communications to include specific limitations on benefits or to include a description of plan amendments, and conflicts between the provisions of these employee communications and the plan document and/or plan operations.

Recent Litigation. Historically, an SPD provision that was in conflict with the provision of the plan typically would not be enforced by a court, because the SPD was not treated as a legally enforceable plan document (and most SPDs stated this on their first pages). However, over the past few years, a number of courts – including our Fourth Circuit Court of Appeals -- have ruled that the SPD is part of the legally enforceable plan document and have held, for example, that an SPD provision that is in conflict with the plan will be enforced and that a plan provision that is not described in the SPD will not be enforced. The participants or beneficiaries in these cases have received benefit awards that exceeded the benefits specified in the plan document.

IRS/DOL Requirements. In addition to the general statutory requirements, the IRS and the DOL have published specific requirements for (1) the content of the SPD, any SMM, and the administrative forms used to describe a participant’s rights and obligations concerning the plan (e.g., benefit alternatives and elections), (2) the timing for providing these communications to participants and beneficiaries, (3) the method for distributing these communications, and (4) the individuals who must receive these communications. Examples of these requirements include:

An amended and restated SPD must be prepared and distributed every five years if there have been amendments to the plan during the prior five year period.

A qualified retirement plan must adopt and have available for participants its procedures for determining whether a court order qualifies as a “qualified domestic relations order” (QDRO).

None of these communications can be delivered electronically, unless specified requirements for electronic delivery are met.

Because these statutory and regulatory requirements have changed over the past few years, and because the plaintiff's bar and the regulators seem to have "awakened" to these requirements, we recommend that employers take the time to review each SPD, SMM and administrative form for each employee benefit plan to be sure it is up to date, includes all required explanations (including any benefit limitations), is consistent with the terms of the plan document and the operation of the plan, and meets all applicable requirements for content and delivery of these communications.

Please contact us if we can provide any assistance with this effort.