



new benefit statement requirements become effective in 2007

MSK Client Alert

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The Pension Protection Act of 2006, which was enacted this past summer, included new benefit statement requirements that will become effective as early as the first quarter of 2007 for some plans. The Act also requires 401(k) plans allowing investment in employer securities to permit participants to diversify their investments, effective in 2007, and to give notice to participants with respect to these diversification rights. The U.S. Department of Labor (DOL) has recently issued a Field Assistance Bulletin that explains both of these notice requirements.

The new benefit statement requirements will affect all plans and are generally effective in 2007. Although plan administrators may already be in compliance with some of the new requirements, there are certain required disclosures that most plan administrators are probably not now including in their benefit statements that may require revising benefit statements currently in use.

Plan administrators must provide participants with a benefit statement at least:

- Once each calendar quarter in the case of a defined contribution plan that allows participants to direct investment of accounts;
- Once a year in the case of individual account plans that do not allow participants to direct their investments; and
- Once every three years in the case of an actively employed participant with a vested accrued benefit under a defined benefit pension plan.

The benefit statement must set forth the total accrued benefit, the vested portion and, in the case of non-vested benefits, the date they will become vested. If the plan is integrated with Social Security that must be explained as well. For individual account plans, such as 401(k) plans, the statement must also include the value of each investment to which account assets have been allocated, including any employer securities, with valuation determined as of the most recent valuation date under the plan.

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If the plan provides for direction of investments, the benefit statement must also include:

- A description of any limits under the plan on the participant's right to direct investments;
- An explanation of the importance of a well-balanced and diversified investment portfolio, including a statement of the risk of holding more than 20 percent of a portfolio in the security of one entity (such as employer securities); and
- A notice directing the participant to the DOL website for sources of information on individual investing and diversification.

Until further guidance is issued, the DOL is permitting plan administrators to use multiple documents or sources to provide the required information, provided participants receive notice in advance of the deadline date as to how to obtain the required information. Thus, not all required information must be set forth on a single piece of paper.

The DOL has also stated that the types of limits that must be disclosed are those imposed by the plan, such as limits on the percent of an account that can be invested in a particular investment or limits on the frequency of certain trades, and not limits imposed by the investment funds or state or federal securities laws.

The DOL has also prescribed model language that can be used to satisfy the requirements of explaining the importance of diversification. This model language, if included in the benefit statement, may also be used by certain plans to satisfy the separate requirement that plans permitting investment in employer securities provide notice of the participant's right to diversify his investment in employer securities.

If a plan is conferring diversification rights with respect to employer securities for the first time in 2007, as a result of the Pension Protection Act, then the DOL has stated that notice of the diversification rights should be given as soon as possible after January 1, 2007.

However, if a plan permitting investment in employer securities has provided diversification rights before 2007 equal to those required by the Act, then the benefit statement may be used to satisfy the requirement that plans notify participants of their right to diversify these investments. Thus, for plans that provided diversification rights that satisfied the PPA requirements even before they were enacted, the DOL has determined that provision of the benefit statement described above will also be sufficient to satisfy the diversification notice requirement and a separate notice regarding diversification rights applicable to employer securities will not be necessary.

Benefit statements must be written in a manner "calculated to be understood by the average plan participant" and may in some cases be furnished electronically. If statement information is provided on a continuous basis through a secure web site, that will constitute compliance if the participants are provided notice of the availability of this information through the web site and an explanation of how to access the web site and the right to receive a paper version of the statement.



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For plans that operate on a calendar year, the statement requirement must first be satisfied for the quarter ended March 31, 2007 for defined contribution plans offering investment direction rights. For fiscal year plans, the deadline would be due with respect to the last day of the three-month period beginning on the first day of the plan year. For example, if the plan year begins on July 1, the first quarterly statement would be due with respect to the period ending September 30, 2007. For both calendar year and fiscal year individual account plans that do not provide the right to direct investments, the first annual statement would with respect to the year ended December 31, 2007.

The statement must then be furnished within 45 days after the end of the applicable period. This means that the statement for the first calendar quarter of 2007 would be due by May 15, 2007.

For defined benefit pension plans, the first benefit statement requiring compliance with the new requirements will be due for the 2009 plan year. The defined benefit pension plan requirements can also be satisfied if the plan administrator notifies the participant once a year of the availability of the pension benefit statement and ways in which the statement can be obtained. Years in which no benefits accrue under a defined benefit pension plan do not have to be taken into account in determining the three-year period for benefit statements.

These requirements are effective in 2007, although the effective date may be delayed in some cases if the plan is subject to a collective bargaining agreement. Until regulations are issued providing greater detail, the DOL has said it will not bring enforcement actions against plan administrators acting in good faith compliance with a reasonable interpretation of the statute.

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