

The SPD Opportunity – SECURE 2.0, Cybersecurity and More

Five years is the general shelf life of a summary plan description (SPD) for an employee benefit plan. Of course, the actual rules of the Employee Retirement Income Security Act (ERISA) are more complicated and technical. If a plan has not been amended at all, then its SPD can live for another five years, for a total of ten years. But, even in that case, should it?

Updating an SPD timely, or even early, presents a great opportunity to enhance employee engagement, communicate legal changes that impact plan operations in an integrated way, and provide additional protective information.

What is an SPD?

An SPD is a participant-facing document that summarizes the benefit plan's provisions and provides certain other information about the plan and applicable law governing the plan. In other words, the primary purpose of an SPD is to communicate to participants about the plan. SPDs must be written in a way to be understood by the average plan participant and sufficiently detailed to inform participants and beneficiaries of their rights and obligations under the law. A notice in a foreign language must be included in the SPD if a workforce has a concentration of workers who only speak that language or, alternatively, an SPD must be written in that language.

Who Gets One and When?

Plan administrators must automatically give each participant a copy of the SPD within 90 days after he or she becomes covered under the plan, and each pension plan beneficiary must receive a copy of the SPD within 90 days after his or her benefits begin under the plan.

Upon request, the plan administrator must provide an SPD to a participant or beneficiary, including a beneficiary not yet in payment status, and the failure to do so within 30 days carries a maximum \$110 per-day penalty. A reasonable charge for providing the SPD is permissible upon request.

Additionally, failure to provide a copy of the SPD to the U.S. Department of Labor (DOL) within 30 days of a request – a routine request in a DOL audit – will also subject the plan administrator to penalties of up to \$171 per day.

If the plan is amended, a summary of material modifications (SMM) to the SPD must be provided within to participants and beneficiaries receiving benefits within 210 days after the end of the plan year in which the change was made.

Under the Affordable Care Act, an SMM must be provided 60 days in advance of changes to a health plan.

As an alternative to an SMM, the SPD can be updated to reflect the change or changes. An updated SPD has the advantage of integrating the change into SPD as a whole and eliminating the need to keep track of separate SMMs that need to be delivered with the SPD when it is provided to new hires or upon request.

SECURE Act and SECURE 2.0?

Changes in retirement plan law are often required operationally before the plan must be amended. For example, many SECURE Act 2.0 provisions, both required and optional, have effective dates in 2023 or 2024, while the amendment deadline is generally the last day of the 2025 plan year. As noted above, the requirement to provide an SMM for a retirement plan is triggered by the amendment date. Yet, the main purpose of an SPD (and any related SMM) is to provide accurate information about the plan's provisions and apprise plan participants about their rights and obligations under the plan.

In this case, it may make sense for the SPD to be updated to reflect the operational changes that affect participants' rights and obligations under the plan (e.g., an increase in the required minimum beginning date to age 73) prior to the amendment date. If the SPD is not updated, the plan administrator should communicate such operational changes in some other way that apprises participants of their rights.

What is the SPD Opportunity?

An SPD is more than just a required plan document with required disclosures; it is also a medium for plan sponsors to communicate information about the plan which can mitigate the risks associated with the plan.

A great example of this approach is updating an SPD to address cybersecurity concerns for 401(k) and other individual account plans. Plan sponsors, recordkeepers and other service providers utilize and share an immense amount of personally identifiable information and other plan data to administer 401(k) plans. Only relatively recently – in 2021 – did the DOL issue guidance confirming that plan fiduciaries have a fiduciary obligation in connection with cybersecurity.

Moreover, the DOL's guidance recognized that plan participants play a critical role in the security of their own accounts by including online security tips aimed at plan participants and beneficiaries. Finally, a number of 401(k) plan recordkeepers require participants to regularly check their online accounts and contact the plan administrator immediately if anything is amiss in order to have their account restored under the recordkeeper's procedures for account restoration in the event of cyber theft.

The SPD is a great means of delivering this type of important information to plan participants. Providing this information can help participants safeguard their accounts and/or have their accounts restored if they are the victim of cyber theft. Communicating this information, in itself, also has independent value as a demonstration of fiduciary attention to the important area of cybersecurity.

Cybersecurity and restoration of account information are just an examples of the type of information that can be addressed in an SPD to help manage the risks of maintaining a plan. Other examples include arbitration provisions, class action waivers, choice of law and venue provisions. Against a backdrop of increasing retirement plan litigation and decreasing fiduciary liability insurance coverage, an updated and thoughtful SPD can be an important risk management tool.

About the Author

Sarah Lowe is a partner in Frost Brown Todd's Nashville office, where she focuses her practice on employee benefits, with an emphasis in the areas of qualified plans, related ERISA fiduciary issues, and pension plan investments. She also has significant experience counseling plan sponsors and fiduciaries on pension de-risking and complex annuity transactions, as well as the design and administration of qualified plans and related funding vehicles.

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