



Retirement Plan Update

DOL Explains ERISA Bonding Requirements

Few ERISA requirements are more mysterious to the plan sponsor than the bonding requirement of ERISA Section 412. In late 2008, EBSA (an agency of the Department of Labor) published Field Assistance Bulletin 2008-04 (<http://www.dol.gov/ebsa/regs/fab2008-4.html>), which addresses various issues concerning the application of ERISA's fidelity bonding requirements. While the guidance may not be "anything new," it organizes in one document those questions you may not have known to ask.

Background

Under ERISA, every fiduciary of an ERISA-covered employee benefit plan and every person who handles funds or other property of such a plan must be covered by a bond, unless they qualify for the exceptions to the bonding requirement (such as financial institutions). ERISA's fidelity bonding requirements are intended to protect plans from risk of loss due to fraud or dishonesty by persons (referred to as "plan officials") who handle plan funds or other property.

A plan official must be bonded for at least 10% of the amount of funds handled, subject to a bonding minimum of \$1,000 per plan and a maximum of \$500,000 (maximum bond of \$1,000,000 for plan officials of plans that hold employer securities).

While there is no monetary or other penalty under ERISA for failure to maintain a fidelity bond, in the past the DOL has sued plan fiduciaries in an effort to enforce the bonding rules.

Among other things, the Field Assistance Bulletin advises that:

- A person is deemed to be "handling" plan funds or other property whenever his duties or activities pose a risk that the funds or other property could be lost in the event of fraud or dishonesty on the part of that person, whether acting alone or in collusion with others.

If a plan committee has authority to direct payment of plan benefits, the committee members are "handling" plan funds and each committee member must be bonded.

- A plan bond:
 - May be purchased with plan assets;
 - Cannot have a deductible, but must insure the plan from the first dollar of loss;
 - May be written for a period longer than a year; and
 - Can name more than one plan as an insured, through an "omnibus clause" or otherwise, as long as the bond's limit of liability is sufficient to insure each plan as though that plan were bonded separately.
- Plans that are not covered by ERISA Title I, or that are entirely unfunded, are not subject to the bonding requirement. There is no specific exemption for SEPs and SIMPLE IRAs or for fully insured plans, although in practice the persons who handle funds for those plans often qualify for the financial institution exception.
- Bonds cannot be obtained from just any bonding or insurance company but must generally be placed with a surety company or reinsurer that is named on the IRS's Listing of Approved Sureties, Department Circular 570. (http://fms.treas.gov/c570/C570_a-z.html)

- A fidelity bond is not the same as fiduciary liability insurance. Fidelity bonds are required by ERISA to protect the plan against fraud or dishonesty by individuals who handle plan assets. Fiduciary liability insurance, although not required by ERISA, protects the plan against losses due to breaches of fiduciary responsibilities and protects the fiduciaries in the event of a lawsuit or DOL action.
- A plan is not required to purchase the bond for any outside service providers who are required to be bonded independently in their professional role. The service providers can purchase their own separate bonds insuring the plan. Nothing in ERISA, specifically, requires the plan to pay for that bond.
- The Field Assistance Bulletin makes it clear that the choice of fidelity bond types and the need to purchase a bond in an amount greater than that required by the statute is a fiduciary decision subject to ERISA's prudence standards.

Take Special Note of the DOL's "Enhanced Bonding Requirement: Small Plan Audit Waiver"

Small plans (those with less than 100 eligible participants) with more than 5% of total assets in "non-qualifying plan assets" are exempt from ERISA's annual independent CPA audit requirement only if the plan maintains a fidelity bond equal to at least 100% of the value of the "non-qualifying plan assets."

If such a plan has no bond or insufficient coverage, the plan is no longer eligible for the audit waiver and will have to incur the significant added expense of retaining an independent accountant to provide an opinion to be attached to the Form 5500 filing.

DOL Checklist: A Useful Resource

The DOL "standard operating procedure" on plan audit provides for verifying the status of a plan's current bond coverage. As such, you will want to be familiar with the questions on the DOL Audit Checklist (from the Employee Benefit Security Administration (EBSA) Enforcement Manual) and be sure that you know the correct answers for your plan:

- Does the bond provide for payment to the Plan in the event of loss?
- How many Plans are covered by the bond?
- How many non-plan entities are covered by the bond?
- Is the bonding company listed in Treasury Circular 570?
- Is the Plan named as the insured?
- If more than one Plan or Plan Sponsor are covered, is a pay-over rider attached?
- If the bond contains a deductible, is an elimination of the deductible rider attached with respect to the Plan?
- Does the bond protect against fraud or dishonesty?
- Does the bond cover all persons who "handle" funds?

Note: Without a "Definition of Employee" rider, a bond generally excludes "officers, Directors, and Trustees" from coverage.

- Does the bond have a one-year discovery period?
- Does the Plan have fiduciary liability insurance?

Action Plan

Now would be a good time to ensure that your plan has the proper ERISA bond coverage. Should you have any questions, contact our consulting team at 619-696-7284.

This Compliance Alert is not intended as legal advice or as an opinion of specific facts

© 2009, Means & Associates, LLC & ERISA Compliance Associates, LLC