Plan Sponsor

Digest

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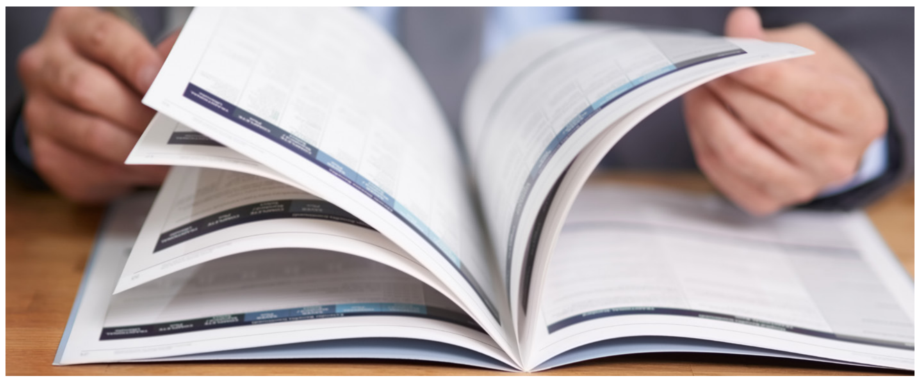
Your Challenge, Our Solutions™

The ins and outs of your plan's SPD

The importance of an accurate, current, and comprehensive summary plan description (SPD) cannot be overstated. In fact, recent court cases have highlighted the need for employers to review their plan's SPD to ensure it does not conflict with the plan document.



What is the summary plan description (SPD)?

The SPD is the primary vehicle for informing plan participants and beneficiaries of their rights and obligations under the plan. It's essentially a summary of the key features of a retirement plan.

What information should the SPD include?

The Employee Retirement Income Security Act (ERISA) specifies what is required in the SPD. The SPD contains a variety of information, such as:

- The plan's name and the name and address of the plan sponsor
- Participant eligibility requirements
- A description of benefits and the vesting schedule
- The plan's normal retirement age
- The sources of plan contributions
- Benefit claim procedures
- Participant rights under ERISA

Is there a specific format that the SPD must follow?

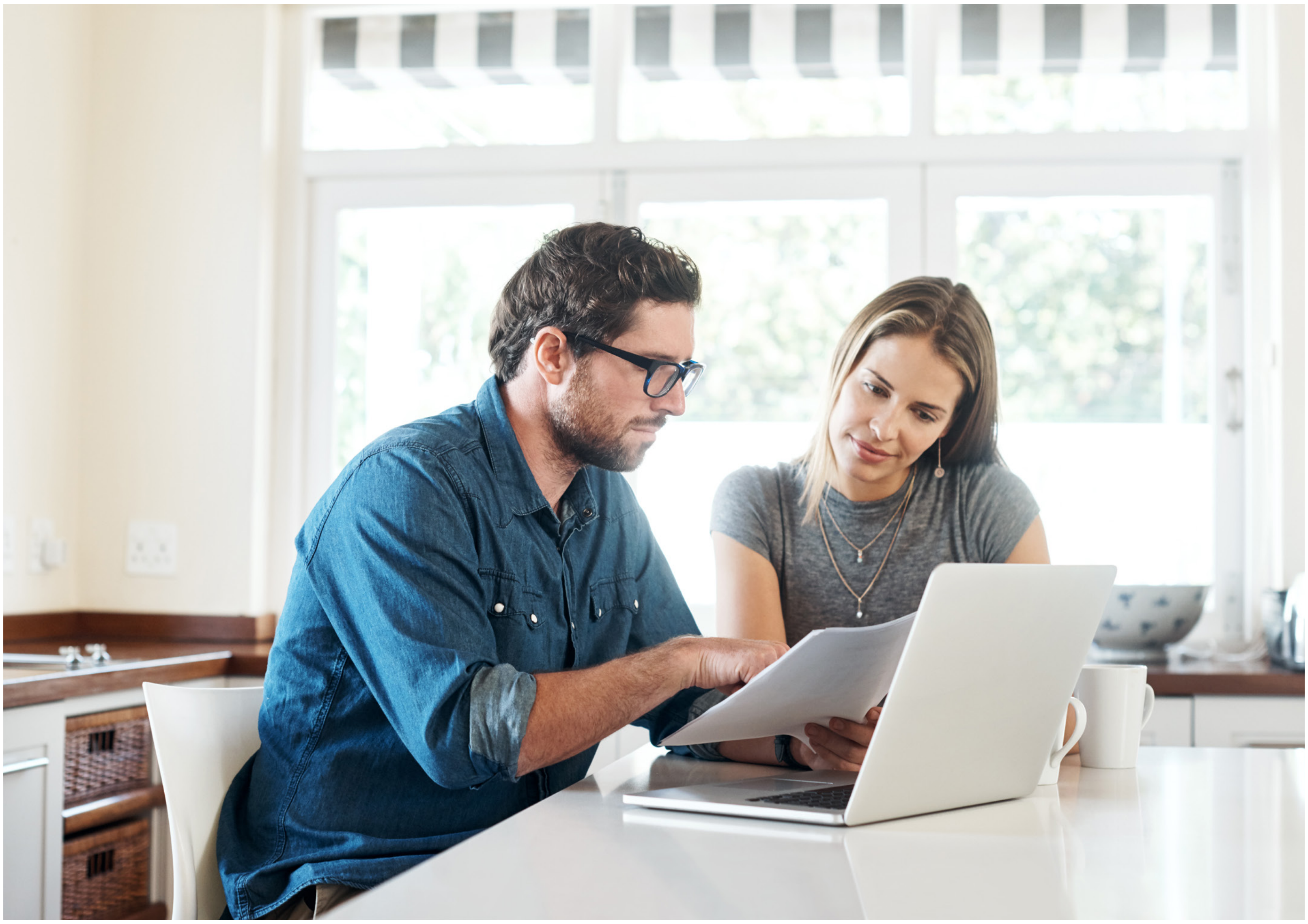
No, but it must be complete and understandable. The language should be written in a way that is easily understood by the average participant and should not be misleading.

When should the SPD be distributed?

In general, employers are obligated to provide participants and beneficiaries with the SPD within 120 days after a plan becomes effective. New participants have to receive the SPD within 90 days of becoming a participant. An updated SPD, which incorporates all interim plan amendments, must be furnished no later than 210 days after the end of the fifth plan year after the previous SPD. If there have been no changes to the plan, a new copy of the SPD must be distributed every 10 years.

Can the SPD be sent electronically to participants?

If certain requirements are met, employers may furnish the SPD using electronic media, such as the Internet, an intranet, and e-mail. However, employers should ensure that appropriate measures are taken to comply with ERISA's electronic delivery rules. For electronic dissemination of plan documents, regulations mandate that employers provide notice to participants that the forthcoming document contains important plan information (e.g.,



employers must give a description of the significance of the SPD and advise recipients that a paper copy of the SPD is also available upon request). The employee's consent may be needed. (This depends on the employee's job function and the availability of electronic access.) Paper versions of the SPD must be given to any recipient without the ability to access documents in electronic form.

Do plans have to provide non-English versions of the SPD?

No. However, if several plan participants are literate only in the same non-English language (25% or more for plans with fewer than 100 participants, and the lesser of 500 or 10% for plans with 100 or more participants), then the plan must provide a non-English language notice that offers the participants assistance in learning about their rights and benefits under the plan.

What if there is a conflict between the SPD and the plan document?

Where there is a conflict between the official plan document and the SPD, and the SPD describes a benefit more favorable to the participant, the SPD has prevailed in a number of cases. Thus, it is critical that employers verify that their SPD is up to date, consistent with plan documents, and contains all the essential information relating to the plan.

In addition to the SPD, what other documents do plans have to provide participants?

There are several. For example:

- A summary annual report (SAR) must be furnished within nine months after the end of the plan year. It's a summary of the information appearing in the plan's annual report (Form 5500).
- A summary of material modifications (SMM) to the plan has to be provided within 210 days after the end of the plan year in which the modification was adopted.

And plans also must provide participants with the following documents upon written request:

- Statement of the participant's total accrued benefits
- Most recent annual report
- Plan document
- Trust agreement
- Collective bargaining agreement (or any other document) under which the plan is established

Check fiduciary liability coverage

Employers that sponsor 401(k) and other defined contribution retirement plans should review their fiduciary liability policies to make sure they provide adequate protection. Here's some information you may find helpful when you check your coverage.

Fidelity bonding is not fiduciary liability insurance

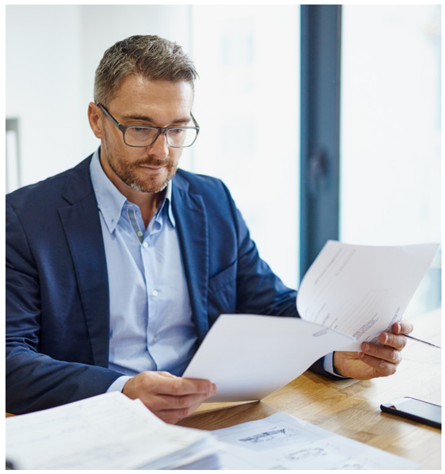
Retirement plan fiduciaries face personal liability exposure that will not be protected by a fidelity bond. The pension law (ERISA) generally requires that every fiduciary of an employee benefit plan and any other person who handles plan money be covered by a fidelity bond. The fidelity bond protects the retirement plan against misappropriation of funds by individuals handling the plan's assets. However, the fidelity bond does not protect against claims for losses sustained because of a breach of fiduciary duty.

Fiduciary liability insurance protection

Fiduciary liability insurance provides protection for trustees and other plan fiduciaries in the event of a breach of fiduciary duty. These policies typically cover settlements or judgments. Wrongful acts that may be covered by fiduciary liability insurance include:

- Negligent investment practices
- Failure to diversify investments
- Failure to file required reports
- Conflicts of interest
- Errors in computing eligibility
- Inadequate instructions to beneficiaries that cause a loss of benefits

The benefit plan itself can purchase fiduciary liability insurance. However, the policy must allow the insurer to seek recourse against the fiduciary if it is determined that the fiduciary breached his or her duty to the plan. Commonly, the employer purchases the insurance as part of the overall compensation package of company



executives who assume responsibility over the company's benefit plan.

Check coverage carefully

Fiduciary liability insurance coverage varies widely from policy to policy, so it's important to check what is covered in your policy and determine if you need additional coverage.

Occurrence or claims-made policies. Most policies are claims-made policies that only cover claims made and reported during the policy period. Look to obtain an occurrence-basis policy that covers all acts that occurred during the policy period, no matter when claims are made.

Aggregation of wrongful acts. If "wrongful act" is defined vaguely in a policy, insist upon a clear, objective definition. A wrongful act is generally defined as a breach of duty under ERISA, another federal law, or state law. And, if multiple wrongful acts may be treated as part of an interrelated series of wrongful acts, negotiate the elimination of this provision. Otherwise, this aggregation provision may allow the insurer to allocate a new claim as part of a prior claim, which may limit what is paid on the claim (in the event that the policy's annual limit is unavailable to pay the claim).

Nonrecourse riders. If the policy is purchased with plan assets, the policy must allow the insurer to recover any paid losses from the fiduciary whose breach caused the loss. To protect themselves, individual fiduciaries can purchase nonrecourse riders. Under a nonrecourse rider, the insurer waives its subrogation rights against the fiduciaries in cases that do not involve fraud, willful neglect, or criminal wrongdoing.

Defense costs. To help ensure adequate defense coverage, fiduciaries may want to purchase a separate defense policy, since many policies count any costs of defending an action against the overall policy limit. Also, a policy may require you to accept defense counsel appointed by the insurer. Purchasing a separate defense policy will allow you to name your own defense counsel.

Punitive damages or fines. Since most policies will not pay punitive damages, you may want to negotiate coverage of punitive damages. Even if a policy covers the 20% penalty tax on fiduciary violations, it may not cover the 15% initial excise tax on prohibited transactions.

60 SOUTH SIXTH STREET | MINNEAPOLIS, MN 55402-4422

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