

401(k) Plan Sponsor

A Quarterly Publication for Oppenheimer 401(k) Retirement Plan Sponsors

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Obama Outlines Retirement Initiatives

In September, President Obama announced several initiatives to encourage increased savings. The initiatives are intended to make it easier for households to put money into tax-advantaged retirement accounts.

Obama proposed four initiatives. The first initiative addressed having employees automatically enrolled in an employer-sponsored 401(k) plan. Also, the Labor Department will provide new guidance for small businesses on how to use automatic enrollment for Simplified plans.

The second proposed initiative will allow people to check a box on their tax returns and receive their refunds in the way of a United States savings bond. IRS officials said the average tax refund is \$2,000 for the 100 million individuals that receive them each year.

In a third initiative, the government will assist employers who have employees who would like to contribute the money for unused vacation time and overtime to their retirement accounts. In general, employers cash out the extra time and give the money to their employees in a contribution to their retirement plan.

Lastly, Obama said the Treasury Department and IRS will work together to provide an easy-to-read guide to assist people in understanding esoteric regulations governing retirement plans when employees change jobs.

As of the date of this newsletter, the IRS has issued a number of notices which formalize these initiatives. Details can be had in Oppenheimer's "New Retirement and Savings Initiatives, October 2009."

Citigroup 401(k) Participant Lawsuit Dismissed

A federal judge in New York dismissed a class action lawsuit filed on behalf of 150,000 participants in Citigroup's two 401(k) plans. Participants felt that Citigroup's inclusion of company stock as an investment option violated its fiduciary duties under ERISA.

U.S. District Court Judge Sidney H. Stein believed that the 401(k) plans "unequivocally required" Citigroup stock be used as an investment option, and thus "had no discretion and could not be acting as fiduciaries" with respect to the plans' investment in company stock.

Judge Stein wrote that "this Court holds that neither the (Citigroup's) Investment Committee nor any other plan fiduciary had a duty to override the plans' mandate that Citigroup stock be offered as an investment option." Moreover, he agreed Citigroup was "consistent with ERISA's language, structure, and purpose."

Lastly, he indicated that the plaintiffs failed to prove their claim that the defendant violated their fiduciary duties by not providing "complete and accurate" information about the financial condition of Citigroup to plan participants.

Auto Enrollment Working as Intended

A new analysis suggests that automatic enrollment in a company sponsored 401(k) plan is working effectively. About 52% of auto-enrolled participants were between the ages 20 and 34. In addition, nearly 56% of participants enrolled automatically have an annual income of less than \$40,000. Moreover, only 10% of the participants automatically enrolled had annual incomes ranging from \$80,000 to \$150,000.

Retirement specialists credit auto enrollment as the driving force behind getting young participants involved in 401(k) plans. For many young and lower-paid employees, auto-enrollment assists them in saving early and consistently which is essential to having a comfortable retirement. Some analysts have found that only one in 10 employees eligible for automatic enrollment choose to opt out of a 401(k) plan. In addition, a significant proportion of participants either accept the default rate set by their employer or elect to increase it regardless of how high the rate.

Employers Should Be on the Lookout for Common Retirement Plan Errors

The IRS provided a list to the public of common recurring mistakes it sees in large case audits of qualified retirement plans and in submissions under its Voluntary Correction Program. Below is a useful checklist for evaluating the operations of qualified retirement plans.

- I. Common Errors Across All Plan Types
 - a. Not amending the plan document in a timely manner for changes in the law
 - b. Not following the plan's definition of and limits on compensation for contribution purposes
 - c. Not enrolling eligible employees and/or excluding ineligible employees
 - d. Not meeting the legally-required minimum distribution provisions in the plan
 - e. Not following the in-service distribution provisions in the plan
 - f. Not using correct distribution forms, and failing to file correct tax reporting on distributions
 - g. Not following the plan's vesting schedule
 - h. Not retaining records and maintaining internal controls regarding administration of the plan
 - i. Not following the terms of a qualified domestic relations order (QDRO)
 - j. Going beyond the legal maximums on contributions and benefits under the plan
- II. Common Mistakes for 401(k) Plans
 - a. Not correcting ADP/ACP nondiscrimination violations
 - b. Not calculating matching contributions in accordance with the plan's formula
 - c. Not limiting deferrals to the plan's maximums
 - d. Not complying with the automatic enrollment provisions in the plan
- III. Common Mistakes for Defined Benefits Plans
 - a. Performing benefit calculations based on inaccurate information
 - b. Not providing the required notice when benefits are suspended
 - c. Not providing commencement of benefits

IRS Requests Guidance on Defined Benefit/401(k) Plans

The Treasury Department and the IRS have announced their plan to provide guidance relating to eligible combined plans under IRC Sec. 414(x), which was added to the Tax Code by the Pension Protection Act of 2006. In Notice 2009-71, the organizations request comments on Sec. 414(x) to help them in developing guidance.

An eligible combined plan under 414(x) consists of a defined benefit plan and defined contribution plan. An employer with at least two employees but less than 500 employees is eligible to sponsor the plan. In addition, the assets are kept in a single trust, but must be easily identified and allocated separately to the defined benefit plan and the defined contribution plan. Permitted disparity (social security integration) is not permitted.

A minimum benefit equal to the lesser of 1% of final average pay multiplied by years of service or 20% of final average pay must be provided by the defined benefit plan. Furthermore, the defined contribution plan portion must use a qualified cash or deferred arrangement that includes a 4%-of-pay automatic contribution agreement. A basic matching contribution of 50% of a participant's elective deferrals up to a maximum of 4% of pay is also required.

Downturn Knocks 15% off Retirement Plans

From December 2007 to June 2009, median retirement account balances in defined contribution plans declined by at least 15%. This decrease in median asset levels in 401(k) plans, profit sharing, and other plans mirrors the slump in the economy.

However, the downturn has not discouraged households from maintaining some form of a retirement account. Nearly 41% of families have a participant from a current job in either a traditional defined-benefit pension plan or defined-contribution plan.

For all households with a defined-contribution plan, the median plan amount was \$31,800 in 2007, an increase of 16% from 2004. Analysts estimate that from December 2007 to June 2009, the median dropped 16.4%, to \$26,578. More specifically, losses were greater for households with an annual income greater than \$100,000 (down 22%) or having a net worth in the top 10% (down 28%).

In addition, there was a shift in the plan type used by households from 1992-2007. The amount of families with a retirement plan who had only a defined-benefit plan declined from 40% to 17.4%. During that same period, the share of households taking part in only a defined contribution plan increased from 37.5% to 60.3%.

This information is based on the 2007 Survey of Consumer Finances, the Fed's triennial survey of wealth.

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10 Things for a Plan Fiduciary To Do

1. **Have a plan investment committee:** ERISA laws require that the named fiduciary make decisions for the plan that are in the best interests of the participants and beneficiaries. Having a plan committee can help with the decision making process.
2. **Have committee meetings:** Meetings are a time to discuss activities and performance of the plan, and represent a key part of a prudent process of review.
3. **Keep minutes of committee meetings:** Prudence is an essential quality for fiduciaries. Keeping notes on meetings will assist in future decision making, document the committee's prudent processes, and provide insight in the committee's activities.
4. **Have an Investment Policy Statement (IPS):** While not required by law, an IPS provides guidelines for the committee to follow. An IPS makes it easier to manage the plan's investment business since it provides a written set of prudent standards regarding the selection and retention of plan investments.
5. **Remove poor performing funds from the plan menu:** Even if there is no IPS for the plan, fiduciaries must conduct plan reviews. Do not let plan participants and beneficiaries continue to lose retirement savings by not removing and replacing poor performing funds.
6. **Understand what it means to qualify for ERISA 404(c) protection:** ERISA 404(c) protection is a provision that offers protection for fiduciaries for being sued for participant investment decisions, assuming specific conditions are met for the plan. However, for one reason or another, many do not actually qualify for ERISA 404(c) protection. Make sure to check that the plan meets those standards and you comply with ERISA 404(c) protection. While it may offer some protection for law suits, a fiduciary has a responsibility for every participant and should always seek appropriate investment options.
7. **Deposit contributions on a timely basis:** When contributions must be deposited into a plan is widely misunderstood. The Department of Labor (DOL) requires that contributions be deposited as soon as it is possible to set aside those assets from the firm's other assets, but no later than the 15th business day of the month following the payday. However, the DOL will frequently hold large plan sponsors to a 7 business day or less standard.
8. **Monitor providers on a regular basis:** Perform regular service reviews. Every year, determine if the plan has access to any new type of services and receiving the advantages of the most current thinking about costs and fees. Every 3-5 years, conduct a formal request for information (RFI) request for proposal (RFP), plan benchmarking, or an equivalent.
9. **Follow the terms of the plan document:** Conduct an "audit" every couple of years on your own to make sure that you are being consistent with the terms of plan document and are correctly administering the plan.
10. **Understand who is a fiduciary—and what that means:** A fiduciary is any person or entity in the plan document with discretionary authority over the management of a retirement plan or its assets or someone that provides investment advice with respect to plan assets, for a fee. In addition, appointing a fiduciary makes you a fiduciary, placing responsibility on members of the plan to act accordingly with the guidelines of the investment plan.