The 401K Today:

What Every Dermatology Practice Must Know

How to ensure you're in compliance with the DOL's revised ERISA rules governing 401K plans.

BY STEVEN ABERNATHY AND BRIAN LUSTER

Last summer, rather quietly, new rules from the Department of Labor (DOL) governing 401K plans went into effect. If, as a small business owner, you're not in compliance, you may be vulnerable to lawsuits (or worse). Why? Despite the changes in rules governing retirement plans, that is, ERISA regulations, going unnoticed by many, the changes affect every dermatologist offering a 401K benefit to employees. For starters, all service providers, that is, the company providing the 401K plan, must have presented the newly required fee disclosures to plan participants. The service providers were also required to disclose earnings (i.e., fees) in excess of $1,000 since every participant has the right to see an accurate breakdown of costs and fees.

While the dates are well behind us and all retirement plan sponsors (that's you, the employer) must be in compliance with the new regulations as outlined by the DOL—many are not. If you own your practice and have not provided comprehensive fee disclosures to your employee participants, you may be vulnerable to lawsuits—and it only takes one employee to blow the whistle. The DOL recently brought on 1,000 new hires whose role is to enforce ERISA rules by serving as watchdogs and issuing government fines (or worse) to offending employers. An estimated 88 individuals, including plan officials, corporate officers, and service providers were criminally indicted for offenses related to their benefit plans, according to the DOL. As plan sponsor you assume fiduciary responsibility. When the government's rules are not met, substantial fines can accrue. Last year's average, as reported by the DOL, was $600,000 per plan—an increase of almost $150K in the past four years alone.

REVIEW THOROUGHLY

Employers are well advised to arrange a thorough review of their 401K plan to reduce any chances of unnecessary litigation, keep unscrupulous financial services firms out of participants' pocketbooks, and be up-to-date with new regulations. It is advisable for plan sponsors, particularly those with small plans (defined as plans with less than 100 participants), to have their current 401K professionally benchmarked to reveal any hidden fees, expenses, and liabilities within it. Small plans may carry fees as high as three percent per year. According to Demos.org, over a participant's lifetime, these fees can rob investors of nearly 35 percent of their total returns. Should financial advisors, who put up no capital and take no risks, take over 1/3 of participants' returns when they put up all of the capital and take on all of the risk? We don't think so. To avoid this fate, knowing where the fees are is tantamount—and now, it's the law.

Generally 401K offerings for employees are managed by an outside retirement plan service provider. Now, if management fees and fund offerings are not properly supervised, there may be harsh legal consequences, such as we saw in the $35 million dollar penalty against ABB Incorporated, the plan sponsor that used Fidelity as their service provider. Neither company properly served the employees' interests.

As plan sponsor, it's your responsibility is to act in the fiduciary interest of your plan's participants, disclose all fees, present information in as transparent a manner as possible, and follow the law. The Department of Labor has outlined their standards on their website (http://www.dol.gov/ebsa/faqs/faq-disclosures.html). It is vital to ensure the plan participants are cared for first, independent of the retirement plan service provider's

PRACTICAL POINTER

Just because your plan was compliant five years ago, doesn't mean it is compliant today. Prudent dermatology practices will have an independent third party review their plan at least once per year. Today's new rules, as well as the Department of Labor's attention on small businesses, could mean more employers in the hot seat.

goals. ERISA regulations governing these plans created greater accountability (and therefore liability) for the plan sponsor—but this liability can be mitigated. How? We recommend:

Build a 404(c) compliant line-up that provides a variety of investment options. 404(c) compliance allows you, the plan sponsor, to shift responsibility for investment results to plan participants. Provided your plan allows employees to choose from a menu of varied investment choices, it's vital that your menu is 404(c) compliant. Essentially, this relieves your plan fiduciary of the liability arising from your participants' investment decisions. Consider a fund line-up that consists of a broad group of low cost passively managed index funds, with little overlap, that give employees access to multiple asset classes.

Hire a co-fiduciary. As a plan sponsor, you have a duty to act in the best interest of your participants. If you are not a prudent expert, you need to go out and find that expertise. The firm that you choose to put your plan together must share in your risk, not profit from it. So rather than working with a broker, who may be compensated by steering a plan sponsor toward funds that increase the sponsor's risks, yet pay the broker a higher commission, we strongly suggest your investment advisor serve as a fiduciary, choosing the investment choices that are best for your employees and the plan sponsor.

Provide participants with education and support. Any retirement plan provider should provide the plan sponsor with comprehensive enrollment materials, educational content, a website with interactive tools, and access to an investment advisor that participants can access for one-on-one support in order to make better financial decisions. Educated participants are less likely to make uninformed decisions, and, not offering educational information sessions could put employers at risk. The investment advisor should also conduct a risk tolerance review with each plan participant.

Adopt a formal, written investment policy. ERISA Section 402(b)(1) requires retirement plans to provide a "procedure for establishing and carting out a funding policy and method consistent with the objectives of the plan." A formal investment policy identifies: a) the investment goals and objectives of the plan; b) sets the decision-making process for structuring the overall make-up of the portfolio and selecting investments; and c) specifies the measuring tools for ongoing performance assessment. The investment policy should focus on how investment decisions are made, rather than the investments themselves. Adhering to ERISA Section 404(c) guidelines with a formal, written investment policy provides plan sponsors added protection.

Be wary of the "No Cost" plan. Many group annuity insurance firms understand businesses don't want to pay anything when beginning a 401K for participants, so they offer to charge a wrap fee as an alternative. It essentially marks up the cost of the underlying investments by as much as 1-1.5 percent per year. The firms that do this know this fee isn't enough to cover their administrative and recordkeeping expenses for your plan upfront. However, after five years, when there's a $2-3 million payroll, they know it's unlikely their rates will be renegotiated. So plan sponsors continue paying excess fees that line the pockets of plan administrators and their brokers. Reuters recently wrote about one such lawsuit involving Mass Mutual. The best way to avoid such headaches is to know what you are getting into from the get-go; professional benchmarking is valuable.

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Consider adding options to allow contributors to increase annual tax deductible retirement contributions beyond the statutory $17,500 annual pre-tax contribution limits.

- A profit sharing plan will enable higher income earners to save as much as $50,000 per year for retirement through tax deferred contributions.
- A defined benefit plan, on top of this, may enable participants to save $200,000 per year in pre-tax contributions.

At five percent in annual appreciation, a plan participant would have accumulated more than $2 million in additional tax deferred savings, assuming only $50,000 in annual pre-tax contributions.

Just because your plan was compliant five years ago, doesn't mean it is compliant today. Prudent dermatology practices will have an independent third party review their plan at least once per year. Today's new rules, as well as the DOL's attention on small businesses, could mean more employers in the hot seat. Don't be punished for your good deeds! Be clear as to what burdens in your 401K plan lie on you—and what do not. ■

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Steven Abernathy and Brian Luster co-founded The Abernathy Group II Family Office, a New York-based multi-family office. Contact them at: sabernathy@abbygroup.com and bluster@abbygroup.com.