6 Things You Need to know about liability in offering employee benefits.

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JOHNSON INSURANCE®

Employee benefit programs are a key, strategic part of many employers' human resources function. Employee benefit programs provide important financial benefits to employees, can improve employee morale and productivity, and provide employers with a competitive advantage in attracting and retaining the best talent in a competitive labor market.

Providing employee benefit programs is not without risk. Employers face legal and regulatory requirements, as well as the financial risk of damages resulting from claims for errors or violation of law in managing these programs.

1) What types of plans are considered "employee benefit plans?"

Employee benefit plans include various forms of group insurance for employees and their families, including health, vision, dental, life and disability insurance. Pension, retirement and 401(k) plans are also considered employee benefit plans.

2) Are there rules an employer has to follow?

Most employee benefit plans are regulated under the federal law commonly referred to as ERISA, the Employee Retirement Income Security Act. ERISA was enacted to protect workers and ensure that benefits that are promised by the employer are received by employees and their families. ERISA has specific rules for operation of employee benefit plans.

Individuals responsible for making decisions about the management of employee benefit plans and plan assets are considered under ERISA to be "fiduciaries." A fiduciary has several duties, including acting in the best interest of benefit plan beneficiaries in providing benefits, defraying reasonable administrative expenses, operating with care, skill, prudence and diligence, diversifying plan investments, and acting in accordance with the plan documents that describe how the benefit plans are supposed to operate.

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3) What happens if a fiduciary doesn't fulfill his or her duties?

Not only can an employer be held liable, ERISA can impose personal liability on individuals who are considered to be fiduciaries. This could include business owners, directors, officers or managers of an employer, who are expected to act in a fiduciary capacity.

4) What types of claims could be made against an employer and any employee benefit plan fiduciaries?

The most common sources of claims allege errors, omissions or breach of duty resulting in an employee not receiving an expected benefit.

Although requiring employees to make their own 401(k) investment selections provides some protection, fiduciary liability claims can arise from many factors:

- Benefits denial, miscalculation or perceived decrease
- Conversion to cash balance plans
- Cutbacks in retiree welfare benefits
- Discrimination
- ERISA Violations
- Failure to monitor investment performance
- Imprudent choice of insurance company, mutual fund or third-party service provider
- Imprudent investment of assets or lack of investment diversity
- Increased cost sharing in medical plans
- Independent contractors or temporary employees seeking benefits
- Perceived excessive administrative expenses and fees charged back to participants

Such claims can be brought by current or former employees, class-action attorneys representing claimants, and the United States Department of Labor.

5) What types of insurance should I have to protect my company and management from the potential liability in offering employee benefits?

FIDUCIARY LIABILITY INSURANCE

In addition to protecting the company, fiduciary liability insurance is the most important insurance protection for the personal assets of individual directors, officers and managers who are considered to be fiduciaries under ERISA. Fiduciaries that are not protected by fiduciary liability insurance may be forced to pay for lawsuit defense costs, damages and judgments out of their personal assets. One court decision stated, "It would appear that prudent fiduciaries would have their plan or employers secure such [fiduciary liability] insurance." (Barker v. American Mobile Power Corporation, 64 F.3d 1397, 1404 (9th Cir. 1995)

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EMPLOYEE BENEFITS ERRORS & OMISSIONS LIABILITY

Companies should also carry employee benefits errors & omissions liability, which is commonly provided as part of a commercial general liability insurance policy. Employee benefits E&O covers claims arising out of the administration of employee benefit plans, but does not cover claims arising out of more complicated ERISA claims.

ERISA BOND

All fiduciaries and persons who handle plan assets must also be covered by a fidelity bond. A fidelity bond is a "crime insurance" policy, which insures against burglary, theft and robbery, and is intended to insure against the theft of plan assets. This requirement is consistent with ERISA's goal of protecting workers' benefits and benefit plan assets. The bond limit is determined by a formula required by ERISA.

Even when outside investment managers or vendors are hired, the employer and fiduciaries are still likely to be named individually in any fiduciary liability claim or lawsuit.

6) What else can I do to reduce my company's exposure to fiduciary liability claims?

Employee benefit plans are highly regulated, so the most important way to reduce liability exposure is to understand and comply with employee benefit plan regulations. An employer may need to work with an employee benefit consulting firm to design their plans and procedures, and create employee communications that are legally compliant.

Benefit plans are allowed to delegate responsibility for managing the investment of plan assets to an investment manager. Selecting qualified investment managers, service providers and quality investment options and insurance products at competitive service fees will also help to protect the employer and fiduciaries. With the hiring or retaining of any vendor, the client should also evaluate the insurance protection that the vendor carries, including professional liability insurance and fidelity bond coverage.

Even when outside investment managers or vendors are hired, the employer and fiduciaries are still likely to be named individually in any fiduciary liability claim or lawsuit.

Conclusion

By understanding the legal requirements and potential liability in offering employee benefit plans, employers have the opportunity to design programs and insurance protection that will protect the assets of the business, the personal assets of fiduciaries, and mitigate the potential for fiduciary liability claims.