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$140 MILLION SETTLEMENT: WHAT IT MEANS TO YOUR RETIREMENT PLAN PRACTICE

JANUARY 13, 2015 DAVID WITZ LEAVE A COMMENT

[The following article by David Witz originally appeared on the eMoney Advisor blog and is reposted here with permission]

In December 2014, two parties in a high-profile ERISA fiduciary breach case filed a motion for the court to approve a settlement worth $140,000,000. This settlement is nearly 10-times greater than some other recent high-profile settlements. To date, this is the largest settlement ever in an ERISA fiduciary breach case involving the receipt of revenue sharing by a service provider.

The lawsuit was originally filed against the defendant in 2001 over an allegation that undisclosed revenue sharing payments from non-proprietary mutual funds were made in violation of ERISA. By no means is this an indication that group annuity contracts are prohibited from use or that the settlement is an admission there was any wrong doing or that the allegations are true. However, the settlement does include a number of action items that I suggest represent a blueprint to mitigate litigation risk for any retirement plan whether it is funded with a group annuity contract or a trust.

If you are an advisor that sells and services retirement plans, you need to consider adopting the following recommendations in your business. These recommendations will require the establishment of new documented processes and procedures that will add to an advisor's labor burden but result in mitigated litigation risk.

1. Present all products offered by a single-covered service provider ("CSP") that your prospect or client qualifies to purchase. Typically, multiple products are tied directly to different pricing scenarios that should be communicated to the responsible plan fiduciary ("RPF") in order to make an informed decision. Any changes that affect pricing after the buying decision is made should also be reviewed with the RPF within 60 days. Clients using Legacy products that have been replaced with more efficient and cost-effective contemporary solutions should be informed of the opportunity to adopt a better solution.

2. If the CSP offers the same investment option in multiple share classes, present your recommended menu with each share class, or at least the book-ends to demonstrate each pricing scenario or range.

3. Identify which investment options are proprietary, non-proprietary, and sub-advised, and identify the cost impact by using one type of fund over another.

4. Disclose the gross and net operating expense ratio, the 12b-1, and any other indirect fee by fund. In addition, disclose the amount as a percent and dollar amount, who can receive it, and who pays it.

5. Provide the RPF with an estimate of the revenue sharing expected for each fund at the beginning of the plan year and a final tally of the revenue sharing paid for each fund at the end of the year. The amount of revenue sharing paid should be compared to other platforms to confirm that the amounts received are competitive.

6. Document the file for any investment option additions, removals, or substitutions added during the course of the contract year by the plan sponsor and the effect that will have on overall cost.

Documentation must include affirmative consent to the investment change by the plan's trustees or the investment manager. Investment changes imposed by the CSP, i.e., product vendor, must provide the RPF with the option to terminate the relationship.

7. Provide access to this information on your website and store the information in a document lockbox.

Keep in mind that these recommendations are not legal requirements, though some are imposed specifically on the defendant as a result of the settlement agreement. To learn how PlanTools technology can assist with meeting these objectives contact David J Witz by email or at 704-564-0482.