

*"The PPA creates an affirmative obligation to provide benefit statements . . . and it establishes rules governing the form, content and timing of those benefit statements."*

## NEW BENEFIT STATEMENT REQUIREMENTS FOR RETIREMENT PLANS

by  
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### INTRODUCTION

The Pension Protection Act of 2006 (the "PPA") imposes new periodic benefit statement requirements on all retirement plans, including individual account type plans like 401(k) plans as well as defined benefit pension plans. The PPA creates an affirmative obligation to provide benefit statements (that is, the statements must automatically be provided to participants and beneficiaries) and it establishes rules governing the form, content and timing of those benefit statements. The PPA also directs the U.S. Department of Labor (the "DOL") to issue regulations and model benefit statements to help employers comply with these new rules.<sup>1</sup> An employer that fails to provide the new benefit statement by its due date can be required to pay to each participant and beneficiary a penalty of up to \$110 for each day that the statement is late.

The PPA benefit statement requirements go into effect for plan years beginning in 2007 (that is, January 1, 2007 for calendar year plans). In the case of 401(k) and other individual account type plans that permit participants to direct their investments, the new benefit statement must be provided quarterly. As a result, if a plan with investment direction operates on a calendar year, compliance with the new benefit statement requirement starts with the quarter ending March 31, 2007.

The DOL has released Field Assistance Bulletin 2006-03 (the "Bulletin") to provide interim guidance on the new PPA benefit statement requirements pending the issuance of regulations and model statements later this year. The Bulletin contains critical guidance for employers facing the fast-approaching requirement to furnish the first quarterly benefit statement.

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<sup>1</sup> The PPA's new benefit statement requirements apply to the "plan administrator." In this newsletter we have substituted "employer" for "plan administrator" since many employers are both the plan sponsor and the plan administrator of their respective plans. Further, from a practical standpoint, obtaining the information for the benefit statements and distributing the statements to participants and beneficiaries will require the employer's involvement.

We also use the term "participant" in this newsletter to include both current employees participating in the plan and former employees who still have a benefit under the plan. Meanwhile, the term "beneficiaries" is intended to cover beneficiaries of deceased participants who are entitled to a plan benefit and alternate payees under a QDRO who are entitled to a benefit.

"[F]or investment directed calendar year plans, the first quarterly benefit statement for the quarter ended March 31, 2007 must be provided by May 15, 2007."

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This newsletter summarizes the PPA's new benefit statement requirements and the Bulletin's interim guidance for complying with those requirements. It is extremely important that employers with investment directed account plans contact their plan recordkeeper and investment provider immediately to ensure that the plan will comply with the Bulletin's interim guidance for quarterly benefit statement by the compliance deadline. As discussed further below, for calendar year account plans, that deadline is May 15, 2007.

## **QUARTERLY BENEFIT STATEMENT REQUIREMENTS FOR INVESTMENT DIRECTED ACCOUNT PLANS**

The PPA requires that individual account plans with investment direction automatically furnish quarterly benefit statements to participants and beneficiaries. Until the DOL issues more detailed guidance and a model quarterly benefit statement, the Bulletin allows employers to make a good faith effort at complying with the new quarterly benefit statement requirements. The Bulletin contains the following specific rules that, if met, will be considered by the DOL to be a good faith effort.

### ***Deadline for Furnishing Statements***

The Bulletin grants a 45-day grace period after the end of each quarter to furnish the new quarterly benefit statements. Thus, for investment directed calendar year plans, the first quarterly benefit statement for the quarter ended March 31, 2007 must be provided by May 15, 2007. Likewise, the deadline to furnish the benefit statement for the second calendar quarter ended June 30, 2007 is August 14, 2007, and so on.

### ***Content of Statement and Temporary Relief Where Required Information Comes from Multiple Sources***

The PPA requires that each quarterly benefit statement include the following information:

- The participant's total account balance.
- The vested portion of the participant's total account balance or, if the participant is not yet vested, the earliest date when the participant will become vested.
- The value of each respective investment in which the participant's account is invested.
- If the plan has a profit sharing formula integrated with Social Security, an explanation of how the formula operates.
- An explanation of any limitations or restrictions on the right to make investment directions.
- Information about the importance of diversifying investments.
- Direction to the DOL's website for investment information.

The Bulletin includes interim guidance, discussed further below, on the last three items.

In many cases, the above information comes from multiple sources. For instance, the employer or plan recordkeeper may maintain the plan's vesting information.

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On the other hand, the plan's investment provider will typically maintain plan investment-related information. As a result, it would be difficult for most employers to compile all the required information from multiple sources in time to meet the deadlines for the first few quarterly statements.

In order to alleviate this problem, the Bulletin permits employers to rely on multiple documents or sources of information to satisfy the initial quarterly statements rather than combining all the required information into a single document. However, in order to rely on this temporary multiple source rule, an employer must provide a notice to participants and beneficiaries explaining in simple to understand terms how and when the benefit statement information will be furnished or made available. This special notice, moreover, must be provided to participants and beneficiaries before the deadline for the first quarterly benefit statement (that is, before May 15, 2007 in the case of a calendar year plan).

### ***Furnishing Statements Electronically or Through a Website***

The PPA permits the quarterly benefit statement to be furnished in written, electronic or any other appropriate form that is accessible to participants and beneficiaries. For purposes of electronic distribution, the Bulletin provides that employers will be deemed to act in good faith if they follow existing DOL or IRS regulations for using electronic media to distribute certain notices and other documents to participants and beneficiaries. Generally, these regulations require that (i) the system for furnishing documents electronically (such as e-mail or a company intranet website) results in actual receipt of the transmitted information, (ii) each recipient of the electronic document receives prior notice of the significance of the document, and (iii) such notice explains that a paper version of the electronic document will be provided free of charge to the recipient upon request.

In addition, the Bulletin provides that the required quarterly benefit statement can be delivered through a secure website that is continually available to participants and beneficiaries. Accordingly, *the employer is relieved* of the requirement to furnish a quarterly benefit statement if all the required information is continually available through a secure website. This exception to the quarterly benefit statement requirement may be very useful for many employers since most plan recordkeepers provide internet access to participants and beneficiaries for plan information. Employers should contact their plan recordkeepers to determine if the recordkeeper's website will be updated as necessary before the deadline of the first quarterly benefit statement (that is, before May 15, 2007 for calendar year plans) to include all the required quarterly statement information.

Although the website exception relieves an employer from the obligation to prepare and distribute a quarterly benefit statement, it subjects the employer to a *special notice requirement*. Under the Bulletin, an employer wishing to rely on the website exception must furnish a written notice to participants and beneficiaries that explains the availability of the required information and how it can be accessed. Further, the notice must tell the participants and beneficiaries that they can still request and receive free of charge a paper version of the required information and how they can make such a request. Employers relying on the website exception must therefore *still be prepared to deliver a quarterly benefit statement upon request*. Finally, the special notice described above must be furnished (either in electronic or paper form) prior to the deadline for the first quarterly statement (that is, prior to May 15, 2007 for calendar year plans) and annually thereafter.

### ***Limitations or Restrictions on Investment Elections***

As mentioned above, the PPA requires that the benefit statement include a description of any limitations or restrictions on the right of participants and

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beneficiaries to direct investments. The Bulletin clarifies that this only applies to limitations or restrictions that are imposed *under the terms of the plan*. Accordingly, the statement need not describe any limitations or restrictions imposed by any of the investment fund options available under the plan or by federal or state securities law. For instance, if a mutual fund investment option imposes short-term trading restrictions, those restrictions don't need to be disclosed on the quarterly benefit statement. On the other hand, if the terms of the plan limit the frequency of investment election changes, those limitations must be described on the quarterly statement.

### **Information About Diversification**

As also mentioned above, the PPA requires that the quarterly benefit statement contain an explanation about the importance of maintaining a diversified investment portfolio. The Bulletin contains the following model explanation for employers to use:

*To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security, to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk.*

*In deciding how to invest your retirement savings, you should take into account all of your assets, including any retirement savings outside of the Plan. No single approach is right for everyone because, among other factors, individuals have different financial goals, different time horizons for meeting their goals, and different tolerances for risk.*

*It is also important to periodically review your investment portfolio, your investment objectives, and the investment options under the Plan to help ensure that your retirement savings will meet your retirement goals.*

Employers should consider adding a disclaimer to the benefit statement that the above explanation has been prepared by the U.S. Department of Labor.

### **Department of Labor Website**

Finally, the PPA requires that quarterly benefit statements include a notice directing participants and beneficiaries to the following DOL website for information on individual investing and diversification:

<http://www.dol.gov/ebsa/investing.html>

## **ANNUAL STATEMENT REQUIREMENTS FOR ACCOUNT PLANS WITHOUT INVESTMENT DIRECTION**

The PPA also contains a new benefit statement requirement for individual account plans without investment direction. Those statements have the same content

"All non-investment directed account plans, whether operated on a calendar year or non-calendar year basis, must provide an initial benefit statement for the calendar ending December 31, 2007."

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requirement mentioned above for quarterly statements but excluding the information about investment limitations and restrictions, the importance of diversification and the DOL website reference. These statements must be furnished annually rather than quarterly.

The Bulletin contains the following interim good faith compliance rules for these annual statements.

#### ***Deadline for Furnishing the First Annual Statement***

All non-investment directed account plans, whether operated on a calendar year or non-calendar year basis, must provide an initial benefit statement for the calendar ending December 31, 2007. The same 45-day grace period described above for quarterly benefit statements applies to this initial annual statement. Thus, all initial annual benefit statements for individual account plans without investment direction must be provided by January 14, 2008.

#### ***No Multiple Source Rule***

The multiple source exception described above for quarterly benefit statements *does not* apply to the annual benefit statement. Presumably, the DOL believes employers will have sufficient time before the first annual statement is due to implement steps to compile the necessary information for the statement. Also, the content of the annual statement is less extensive due to the absence of the right to direct investments under the plan. As noted above, the annual statement doesn't include an explanation about investment restrictions or limitations, the model DOL language about diversification or the reference to the DOL website.

#### ***Treatment of Plan Loans***

Since PPA's enactment there has been a question about whether a plan loan feature would be considered to give participants the right to direct investments and thereby trigger the quarterly benefit statement requirements for plans that otherwise don't permit investment direction. The Bulletin makes it clear that is not the case. As a result, plans without investment direction that have a plan loan feature only need to comply with the annual benefit statement requirement.

#### ***Furnishing Statements Electronically or Through a Website***

The same rules described above for quarterly benefit statements apply to furnishing an annual benefit statement electronically or through the plan recordkeeper's website. Accordingly, the employer is relieved of the annual statement requirement if all the required annual statement information is continually available to participants and beneficiaries through the plan recordkeeper's secure website. However, to rely on this exception, the special notice described above for the website exception must be provided to participants and beneficiaries prior to December 31, 2007 and annually thereafter.

### **BENEFIT STATEMENT REQUIREMENTS FOR PENSION PLANS**

The PPA also contains new benefit statement requirements for defined benefit pension plans. Those statements must include (i) a participant's total accrued benefit, (ii) the vested portion of the participant's total accrued benefit or, if the participant is not yet vested, the earliest date when the participant will become vested, and (iii) an explanation of the plan's integration formula if the plan is integrated with Social Security. Unlike the quarterly and annual statement requirements for individual account plans, the pension plan benefit statement need only be furnished once every three years. Further, only those persons who are employed by the employer at the time the statements are furnished must automatically receive a statement.

*"Employers should be discussing these new requirements with their plan recordkeepers and, in the case of investment directed plans, with their plan investment providers, to ensure that they will be in compliance with the new requirements by the fast-approaching deadlines."*

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In addition to creating new affirmative benefit statement obligations for pension plans, the PPA retains the prior rule requiring that a benefit statement be furnished to a participant or beneficiary upon request. However, an employer need not furnish a requested benefit statement more than once during a 12-month period. Employers who receive a benefit statement request must provide the statement within 30 days of the request.

The Bulletin contains the following interim good faith compliance rules for the pension plan benefit statements that must automatically be provided to participants once every three years.

#### ***Deadline for Furnishing Statements***

The Bulletin confirms that due to the three-year requirement for furnishing pension plan benefit statements, the first plan year for which the pension plan benefit statement is due is the 2009 plan year. Presumably, future DOL guidance will specify the deadline for when those initial statements must be provided.

#### ***Alternative Notice***

In lieu of furnishing the pension benefit statements every three years, the PPA permits an employer to provide participants with a notice each year that advises the participant of the availability of the pension plan benefit statement and how the participant can obtain it. In order to rely on this alternative notice procedure, the Bulletin requires that an employer furnish the first notice no later than December 31, 2007. Importantly, the 45-day grace period mentioned above for individual account plan statements *does not* apply to this December 31, 2007 deadline. Further, employers who rely on this alternative notice procedure must still be prepared to deliver a benefit statement to participants who request a statement after receiving the alternative notice.

#### ***No Multiple Source Rule***

As with the annual statement for individual account plans without investment direction, pension plan benefit statements must include all of the required information and cannot rely on the exception that permits the information to appear in multiple sources. This limitation on the multiple source rule is even more understandable for pension plans given the lack of any investment-related information on the pension plan benefit statement.

#### ***Furnishing the Statement or Alternative Notice Electronically***

The pension plan benefit statement or the alternative notice described above can be furnished in written, electronic or any other appropriate form that is accessible to participants and beneficiaries. Accordingly, the same rules for electronic distribution described above for individual account plans apply to the pension plan benefit statement and alternative notice. However, the special website access rule provided under the Bulletin for individual account plans does not apply to the pension plan benefit statement. As a result, the pension plan benefit statement or the alternative notice must be furnished either in paper or electronic form within the deadlines described above.

#### **CONCLUSION**

The above benefit statement requirements create significant new affirmative disclosure obligations for employers. Employers should be discussing these new requirements with their plan recordkeepers and, in the case of investment directed plans, with their plan investment providers, to ensure that they will be in compliance with the new requirements by the fast-approaching deadlines. The Bulletin provides helpful interim guidance to assist employers with meeting those deadlines.