

ADDITIONAL GUIDANCE FOR PLAN'S QDIA

On October 24, 2007, the U.S. Department of Labor ("DOL") published final regulations relating to the Qualified Default Investment Alternative ("QDIA"). A QDIA is provided in a qualified retirement plan, such as a 401(k) plan that allows each plan participant to direct the investment of the participant's account in the plan, when a plan participant does not make an investment election on how to invest the participant's account balance in the 401(k) plan. The participant's account is then invested by default into a specific investment option until the participant actually elects how to invest his or her account balance in the plan. The final regulations are important because they give employer sponsors of qualified retirement plans guidance on choosing default investment options and provide a way for the employer to be relieved of fiduciary liability for investment losses due to the default investment option.

More importantly, the new regulations are significant because when coupled with an automatic enrollment feature in the 401(k) plan that meets ERISA's requirements to be an eligible automatic contribution arrangement, the federal law preempts any state law regarding the automatic enrollment feature of the plan that allows withholding for salary deferrals without written authorization from employees. In addition to the preemption, if an employer tries to comply with ERISA 404(c) in order to limit the employer's liability for investment losses by allowing its 401(k) plan participants to direct their investments in the plan, the new regulations provide that the employer can still have the relief of fiduciary liability under the new regulations even if they do not actually comply with 404(c).

In order to be entitled to the relief of fiduciary liability under the QDIA regulations, the following conditions must be met: (1) the participant assets must be invested in a QDIA; (2) the participant had an opportunity to direct the investment of the participant's account; (3) a written notice is provided to the participant; (4) investment materials are provided to the participant; (5) the participant is able to transfer the participant's account out of the QDIA at least once each quarter; (6) transfer or any withdrawal fees, expenses or restrictions do not apply; and (7) the plan must offer a broad range of investment alternatives. The suggested default investment options are: (1) life cycle funds or target retirement date funds; (2) balanced funds; and (3) managed accounts. No employer stock is allowed as a QDIA.

In response to many questions on the final regulations, the DOL has just issued a field assistance bulletin (No. 2008-03) (Source: <http://www.dol.gov/ebsa/pdf/fab2008-3.pdf>) which provides some additional good news. The QDIA regulations do apply to 403(b) plans that are covered by ERISA and the regulations apply not only to the automatic enrollment feature of a plan but also to the automatic cash-out feature of a plan that requires a rollover of small amounts distributed from the plan into an IRA. The bulletin also clarifies that if an employer is not able to distinguish between participants who directed their investments into a default fund and those who defaulted into the same fund, the employer may provide a new investment election form to all participants invested in such fund, may transfer any accounts of participants who fail to complete the form to a default fund that is a QDIA and, assuming all other requirements are met, the employer will have relief under the QDIA regulations.

If you have any questions, need a QDIA notice form, or would simply like to know more about QDIA's, please contact a member of Koley Jessen's Employment, Labor and Benefits Group.

The Koley Jessen Employment, Labor and Benefits Group:

Margaret C. Hershiser
402.343.3711
margaret.hershiser@koleyjessen.com

Richard D. Vroman
402.343.3810
richard.vroman@koleyjessen.com

Ryan J. Sevcik
402.343.3859
ryan.sevcik@koleyjessen.com

Joan M. Cannon
402.343.3753
joan.cannon@koleyjessen.com

Leilani M. Harbeck
402.343.3767
leilani.harbeck@koleyjessen.com

Julie A. Schultz
402.343.3766
julie.schultz@koleyjessen.com

Allyson Crossman Slobotski
402.343.3842
allyson.slobotski@koleyjessen.com