

**STATEMENT OF THE PENSION RIGHTS CENTER
ON MANDATED DISCLOSURES FOR RETIREMENT PLANS –
ENHANCING EFFECTIVENESS FOR PARTICIPANTS AND SPONSORS
BEFORE THE ERISA ADVISORY COUNCIL**

JUNE 7, 2017

Good afternoon. I am Jane Smith, Policy Analyst for the Pension Rights Center. The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees and their families. We applaud the ERISA Advisory Council for again studying the effectiveness of retirement plan disclosures to participants and beneficiaries. Thank you for inviting us to testify.

ERISA's disclosure scheme is designed to inform participants and beneficiaries of their rights and obligations under their retirement plans. Additionally, some required disclosures are intended to enable participants and beneficiaries to monitor their plans so that their earned benefits will be paid upon retirement. Unfortunately, and all too often, plan disclosures to participants are confusing and written in technical language that is difficult for participants to understand.

At the Center we receive many calls from retirement plan participants with questions about the disclosures they received from their plans. Even some of the Labor Department's model notices can be obtuse and confusing. In particular, the Labor Department's model notice for multiemployer plans in critical status generates calls to the Center.¹

My comments first will focus on general suggestions for modifying Labor Department required notices, and then I will address the specific questions in the Council's issue description.

General comments on improving disclosures to participants

The importance of clear language disclosures cannot be overemphasized. If the Pension Rights Center is receiving many calls about confusing notices, it is probably true that employers are receiving more calls about the same disclosures. Well written disclosures benefit plan sponsors and employers, as well as the participants and beneficiaries who receive them.

¹ The Pension Rights Center serves as the technical support center for the U.S. Administration for Community Living/Administration on Aging's Pension Counseling and Information Projects that assist participants seeking help in obtaining the retirement benefits they have earned. When appropriate we refer callers to the Counseling Projects or our National Pension Lawyers Network. We also assist individuals directly.
<http://www.pensionrights.org/find-help>

The Pension Rights Center has testified before the ERISA Advisory Council about participant disclosures many times during our 41 years, most recently in 2005 and in 2009.² In our 2009 statement we emphasized the importance of Labor Department standard language and model notices. A few of the Labor Department’s model notices continue to be confusing, but several other model notices have been improved. The Government Accountability Office found that model notices are widely used by plan sponsors and are generally helpful to participants.³

Suggestions for all notices

While some required disclosures are provided automatically to participants, annually or when employment begins, many others are provided when a triggering event occurs, such as a material modification to the plan. The following suggestions apply to all required notices.

As we testified in 2009, the Department of Labor could draft introductory information for all required disclosures that would answer the following questions:

1. What is this?
2. Why am I receiving it?
3. What do I do with it? Must I do anything?
4. Will this affect my current or future benefits?
5. Whom do I contact at the plan or EBSA with a question?

The Employee Benefits Security Administration (EBSA) of the Labor Department could write introductory paragraphs for each required notice in language understandable to the average participant. For example, the answer to the question, “what is this,” could be a descriptive sentence and not just the name of the notice. The introductory paragraph we recommend would be generic, providing general information about the notice itself. Additionally, the most relevant information in the notice for participants should be presented first with more detailed information given later. We also recommend that EBSA require plans to use the model language for descriptions of notices.

The model Annual Funding Notice for multiemployer pension plans revised in 2015 has a good example of an introductory paragraph.⁴ It describes what the notice is about, that the notice is annual and required by law, that the notice is for informational purposes and does not require a response, and that the notice does not mean the plan is terminating. Additionally, the model

² Statement of the Pension Rights Center on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries. ERISA Advisory Council, September, 2009.
http://www.pensionrights.org/policy/presentations/090915statement_of_prc_erisa_advisory_council.pdf.

³ GAO-14-92, “Private Pensions: Clarity of Required Reports and Disclosures could Be Improved,” page 34.

⁴ Annual Funding Notice for Defined Benefit Plans; Final Rule, February 2, 2015, Federal Register p. 5657.
<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28049>

notice provides the funded percentage immediately with a plain language description of “funded percentage.” It also defines endangered, critical and critical and declining status followed by a clear statement that indicates whether or not the plan meets any of these criteria. The revised model Annual Funding Notice for multiemployer plans is a significant improvement over the first model annual funding notice that was provided in EBSA Field Assistance Bulletin 2009-01.⁵ We recommend that EBSA similarly revise some of the older model notices, especially the critical status notice. The possibility of losing benefits is alarming, and the model notice fails to explain the situation in language understandable to a typical participant.

ERISA is an incredibly complex body of law and rules. Notices in plain language are hard to write. We suggest that EBSA contract with communication experts to write plain language introductory paragraphs and model notices. EBSA also could solicit comments and suggestions from employers, service providers and participants when drafting or revising notices.

An example of a relatively plain language presentation of ERISA rights is the Labor Department’s booklet “What You Should Know About Your Retirement Plan.” The booklet is a well-organized explanation of participant rights and obligations.⁶ Additionally, the booklet includes a glossary of relevant terms at the end.⁷

Summary Plan Descriptions

Summary plan descriptions (SPDs) and individual benefit statements are the most important disclosures for participants. They provide the basic information most participants need to understand their plans and benefit entitlements. Participants must be able to rely on the information in their SPDs and benefit statements in order to plan for a secure retirement. Although SPDs must be written in language understandable to an average participant, in many cases SPDs are confusing and difficult to follow.

Even though SPDs cannot be compressed into model notices, the Pension Rights Center suggests that EBSA can provide guidance that will improve the presentation and level of understanding of SPDs.

⁵ Field Assistance Bulletin 2009-01, Defined Benefit Plan Annual Funding Notice – Pension Protection Act of 2006. https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/fab2009-1_0.pdf

⁶ Department of Labor, “What You Should Know About Your Retirement Plan,” <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/what-you-should-know-about-your-retirement-plan.pdf>.

⁷ The above booklet, “What You Should Know About Your Retirement Plan,” has a Glossary on page 35.

A general use introductory paragraph could be written for SPDs that emphasizes the need to keep the SPD with permanent records since it is the basic explanation of the retirement plan. Such a notice could mention:

- SPDs are sent every 10 years, or 5 years if the plan was amended,
- all SPDs should be kept since any SPD could be relevant later to an individual's benefit determination,
- participants should take the time to read enough of the SPD to understand how plan benefits are earned,
- an SPD will be provided upon request and copying charges may apply,
- whenever the participant retires or terminates employment he or she should request a copy of the SPD, since the SPD in effect at the time of termination of employment will contain the rules that determine individual benefits,
- participants should notify the employer/plan administrator of any changes in address or family status, such as marriage, divorce, death.

The required statement of ERISA rights should be at the beginning of the SPD.

At the Pension Rights Center we have seen SPDs with no statement of ERISA rights, neither the model statement nor an alternative statement drafted by the plan administrator. Further, circumstances that could cause a participant or beneficiary to lose benefits should be presented at the beginning of the SPD. Additionally, we recommend that the following language be used for any disclaimer included in an SPD.

‘Every effort has been made to make this summary of the plan’s rules as accurate as possible. However, in the unlikely event that a plan rule differs from a statement in this summary, the plan rule will determine your benefits. The plan’s rules are contained in the legal “plan document” which you can request by writing the plan administrator.’

The ERISA Advisory Council’s suggestion of a ‘Summary/Quick Start Guide’ would be most helpful to participants in navigating SPDs. A quick start guide could serve as an expanded table of contents and could be at the beginning of the longer and complete SPD.

The Pension Rights Center recommends that EBSA write a fact sheet for the “Compliance Assistance” section of the website that would summarize the requirements for SPDs. It could include tips on how to write and organize plan information for a SPD. We suggest that EBSA consider recommending that SPDs be organized according to “stages of employment,” such as beginning employment and joining the plan, while at work, and leaving employment or retiring.⁸ Some Labor Department publications, and online presentations of information, are already organized in this manner. A “stages of employment” presentation would break down lengthy SPD information into sections that match life events. Such a break-out would make an SPD easier for participants to use and provide relevant information when it is needed. A summary guide in the beginning of an SPD would still be necessary. A glossary at the end of an SPD also could be helpful to participants.

⁸ The Pension Rights Center has a “Roadmap to Retirement” section on our website with retirement plan information from several sources organized according to “stages of employment.”
<http://www.pensionrights.org/roadmap-retirement>

The Pension Rights Center recommends a change to the statute for delivery of SPDs upon request. The Taxpayer Relief Act of 1997 modified ERISA so that plan administrators only are required to provide the “latest updated” SPD to participants and beneficiaries upon request. However, participants, especially deferred vested participants, trying to determine their benefit entitlements need the SPD in effect at the time of termination of employment. Further, since SPDs only are provided every 5 or 10 years, participants lose them and may need earlier SPDs to determine their benefit entitlements or to compare changes in the SPDs that could affect their benefits. We urge the Council to suggest that the law be modified to permit participant requests for earlier SPDs.

Summary Annual Report (SAR)

Although it is not clear whether the Summary Annual Report is necessary for 401(k) plans that provide quarterly statements to participants, much of the information included in the SAR remains relevant to participants in other defined contribution plans. The original purpose of the SAR was to alert participants to possible mismanagement of their retirement money. Participants in ESOPs, money purchase plans and traditional profit sharing plans continue to need this information. The SAR is a very short, straight-forward fill-in the blanks form. Rather than eliminate this disclosure, we suggest that EBSA review it to determine which information is not relevant to DC plans.

Employer assistance

There are several things that the Labor Department could do to help employers comply with disclosure requirements. Some of these suggestions would also help participants and their advocates. The Center recommends that EBSA post a complete list of required disclosures from all agencies, DOL, IRS and PBGC, in one place on the EBSA website. Rather than listing disclosures alphabetically, we recommend separating disclosures into several categories: first by type of plan, either defined benefit or defined contribution. Each plan type could be further divided into two categories, automatic disclosures and disclosures due to triggering events. In addition, all disclosures relating to participant directed individual account plans could be grouped together. Disclosures on the list could be described in a sentence or two, not just presented as the name of the notice. More complex disclosures, such as SPDs, would require fuller explanations. If a model notice is available for the disclosure, the description should provide a link to the model notice.

The Center suggests that EBSA list all model notices, including IRS notices, in one place on the EBSA website with links to the model notices and brief descriptions of the notices. A separate place for model notices would make it easier for employers to locate and use them. Further, the website needs to be updated regularly. For example, the “Reporting and Disclosure Guide for Employee Benefit Plans” on the EBSA website still gives Field Assistance Bulletin 2009-01 as the source for the model Annual Funding Notice.

Since SPDs are not regularly reviewed by EBSA for compliance, we recommend that EBSA begin selective reviews with the goal of providing helpful tips for employers and plan administrators who are charged with the task of drafting SPDs. There would be no penalties associated with such reviews. The results of the reviews could be summarized in a “lessons learned” fact sheet on the EBSA website that would include both good and bad examples of SPD writing. Alternatively, EBSA could post links to publications and sources of information on how to write in plain language.

Responses to the ERISA Advisory Council’s specific questions

The following questions are those that were not already addressed in the above comments.

A. Are there duplicative disclosure requirements and/or specific disclosures that could be eliminated or combined?

There is a danger in attempting to simplify required notices of losing the accuracy needed to determine benefits and of limiting the ability of participants to monitor their plans. While the Center does not recommend eliminating any notices, we do support combining the delivery of notices when the timing of required delivery is the same and the notices are clearly identified as separate. We would not support a scheme that delivers just a brief notice of the availability of required notices upon request. A required notice should be delivered in its entirety as a stand-alone document.

In 2009 we testified that combining delivery of investment information or benefit statements along with the SPD would overwhelm participants. That is still the position of the Pension Rights Center. The SPD should be delivered alone, and in its entirety.

E. When should disclosures be made to participants to optimize the objective of the specific disclosures?

In general, disclosures need to be made in advance of any opportunity for participants to make decisions. The disclosures should not be so far in advance that participants have forgotten about their choices nor so immediate that participants do not have time to properly consider their options. Generally, a standard of 30 to 60 days in advance would be ideal. In some cases 90 days can seem so far away that participants may forget about the disclosure.

Annual notices should be delivered at the same time every year, whether plan year or calendar year. Consistent delivery helps participants to recognize the notice is a routine annual notice. Consistent delivery also enables comparisons between years.

H. What is/are the most effective and efficient methods of design and distribution?

My comments have already addressed effective methods of design.

The method of delivery must ensure receipt by participants and beneficiaries and must not require undue effort on the part of the recipients. The method of delivery should not present hardship or complications for participants, even for just a few participants. Participants should not have to go to a library to read information posted on a website nor should they have to visit a kiosk or other workplace posting to read required disclosures. Moreover, ERISA disclosures are complex and cannot be understood with a cursory glance. Paper copies are needed so that participants can review the information provided at their own time and pace. Similarly, a postcard advising of the availability of a notice upon request is inadequate delivery. It requires additional steps on the part of participants and beneficiaries, some of whom would forget about requesting the information. Behavioral economics suggests that many participants would not make the additional effort to receive required disclosures. Since required disclosures impart important plan information, they must be delivered in a manner that guarantees receipt. Internet porting of disclosures can be helpful to some participants, but that should not be a substitute method of delivery.

Electronic delivery

For general informational purposes I have included the position of the Pension Rights Center on the issue of electronic disclosure. The Pension Rights Center submitted comments to the Labor Department in 2011 in response to the Department's "Request for Information Regarding Electronic Disclosures by Employee Benefit Plans."⁹

The Pension Rights Center believes that summary plan descriptions and benefit statements should be delivered only by first class mail unless a recipient opts-in to electronic disclosure. These are crucial disclosures for participants and beneficiaries. It is most important for participants to read them and keep them for future reference. For all other disclosures the Center supports the Labor Department's safe harbor for electronic disclosures put forth in the 2002 regulations.¹⁰ This safe harbor permits electronic disclosure to employees who work daily with the employer's computer network as part of their duties. The safe harbor also permits participants and beneficiaries to opt-in to electronic disclosure when the criteria for electronic disclosures are met.

Concluding Comments

⁹Pension Rights Center comments to the Labor Department in response to the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 2011.
http://www.pensionrights.org/sites/default/files/docs/110606_prc_comments_to_rfi_electronic_disclosure.pdf

¹⁰Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans, <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=19158>

The effectiveness of participant disclosures can be improved. This should not be an impossible goal. We commend the Council for building on prior recommendations and for focusing on a few specific disclosures. We appreciate the opportunity to share our ideas on ways to improve disclosures for participants and our thoughts on how the Labor Department can assist plan sponsors in complying with disclosure requirements.

I will be pleased to answer any questions you may have.