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10/3/03 12:00 PM

**More U.S. firms offer pension investment advice**

**By Steve Bates**

The proportion of U.S. companies providing advice to employees about investments in defined contribution pension plans such as 401(k)s is increasing as workers seek more help building retirement nest eggs, according to the Profit Sharing/401k Council of America.

The Chicago-based nonprofit council recently conducted a survey that found about 52 percent of employers provide investment advice. That figure has risen steadily in recent years despite substantial confusion among employers as to what type of investment-related information plan sponsors can provide without increasing the risk of lawsuits from unhappy plan participants.

The Society for Human Resource Management (SHRM) and other organizations and individuals have been urging Congress to adopt legislation protecting employers from liability should workers claim that they lost money because of the investment information or advice they received from employers or the outside firms. Such legislation has not advanced far on Capitol Hill.

In addition, SHRM has advocated creation of a standard education program for HR professionals charged with administering pension plans and for a voluntary certification for such professionals similar to the PHR and SPHR (professional/senior professional in human resources) designations.

Despite the weak stock market in recent years, employees continue to allocate substantial portions of their pension assets to stocks and mutual funds. And they continue to seek general—and sometimes specific—help in the workplace in determining where to put their funds. Attorneys and consultants knowledgeable about pension investment laws and practices offer sometimes conflicting opinions as to what employers can and should do to help workers save for the future.

Part of the confusion stems from various interpretations of U.S. Department of Labor (DOL) guidance on what types of investment information might trigger liability under the Employee Retirement Income Security Act of 1974 (ERISA). Part stems from the wide range of information that employers and plan sponsors offer and employees seek.

A survey by Minneapolis-based American Express Retirement Services earlier this year found that about half of workers with access to 401(k)s said they want help deciding how to allocate plan assets.

Experts generally agree that employers should not suggest specific stocks or funds to employees, but they note that hiring an outside organization to administer a defined contribution pension plan does not transfer or reduce employers' fiduciary duty to act prudently. Such concerns have limited the amount of investment information and advice that employers have made available to workers in recent years, but the new survey would suggest that employers are loosening up.

"The Department of Labor has endorsed advice" on investments, said David Wray, president of the **profit sharing council**. "You can do it and be relatively safe. Where companies are trying to do the right thing, they're OK."

He noted that during the mid- to late 1990s, when the stock market was booming, "advice wasn't important to employees. They all thought: 'I'll be rich and be able to retire at 45.'" After three rough years in the stock market, however, employees want and need information, said Wray.

In the council's survey, firms saying that they do not provide advice cited fears of fiduciary liability, concern about the ability to select competent investment advisers and concern about the ability to monitor advice providers.

Yet the survey found that increasing numbers of plan sponsors of all sizes are providing investment

information and/or advice. In small companies, said Wray, outside financial planners are typically brought in to assist employees with their investments. In large companies, the process is more likely to be technology based. Wray said workers in these firms might use online resources but will “want to talk to a person to validate” their choices before taking final action on investments.

He said there have been few lawsuits against organizations that have provided investment advice, and those typically have targeted companies that have pushed their own stock on employees.

Even though most employee investors have seen their fund balances decrease with the market, said Wray, in general “participants have not blamed their employers. They have not been parading in front of their companies with signs” protesting bad investment advice.

Other experts suggest a more cautious approach to providing investment advice. “It’s still a sticky issue,” said Liz Davidson, CEO of Financial Finesse, an investment education firm in San Francisco. “I don’t see any reason to do it.”

Davidson says the DOL has made it clear that employers and plan sponsors should not be worried about liability for providing information such as:

- The benefits of plan participation and increasing contributions.
- The impact of early withdrawals.
- General financial and investment concepts, such as diversification, risk and return.
- The effects of inflation.
- Model portfolios showing different asset allocations.
- Questionnaires, worksheets, software and similar materials that provide employees with the means to estimate retirement income needs and the impact of different asset allocations.

In fact, she said, employers have a fiduciary responsibility to give workers access to fund performance data and tools to help them make informed decisions about investing their funds. She added that at least once a year employers should evaluate their investment education programs to ensure that the information is free of bias and conflict of interest and that it is being delivered in the way that workers want to receive it.

However, she pointed out, when an employer brings a financial adviser to the workplace to advise employees on specific investments and securities, the employer could be liable for court judgments if the financial adviser is negligent in doing its job.

“We’re waiting for Congress to come out with some sort of law saying to employers: ‘You’re indemnified,’ ” said Davidson.

C. Frederick Reish, managing director of the law firm Reish Luftman & Reicher in Los Angeles, said that concern about investment advice “is probably overplayed” among employers. ERISA requires “prudent decision making” by the employer but does not leave employers particularly vulnerable to suits when employees’ fund balances decline, he said.

“The quality of investment advice is extraordinarily good” among some of the best-known firms such as Morningstar and Standard and Poor’s that employers hire to help workers with their investments. “As more plan sponsors offer advice, it’s becoming more accepted.”

Most good-faith efforts by employers to make investment advice available to employees will run little risk of litigation as long as there is a reasonable process to select investment advisers and “each year you reaffirm that all the reasons for which you selected the adviser are still there.”

Reish noted that there is “a lot of confusion among employers and investment advisers” about what constitutes investment education and what constitutes investment advice. “The line is very fine. It’s very easy to step over.”

He described the profit sharing council’s survey as “an interesting survey with positive value. It may show that investment company employees putting on shows may actually be giving investment advice”—as opposed to just investment education—on a wider scale than previously believed by most experts.

*Steve Bates is senior writer for HR News.*

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