

Participant fee disclosure responsibilities for employers

Over the past several decades it has become the norm for employees to take some responsibility for generating their own retirement income by saving in an employer-sponsored salary deferral plan, such as a 401(k) plan. It has also become common practice to give employees control over how they invest the money in their retirement plan accounts. There has been an ongoing debate about how much information must be given to participants to help them make reasonable investment decisions when this control is offered. The Department of Labor (DOL) resolved that question by publishing a rule defining what information must be given to participants about plan fees and investments in order to comply with the ERISA regulation 404a-5 (which will be referred to for the rest of this article as “the Rule”).

Many employers currently offer a wide assortment of educational materials and tools to assist employees with investment decision-making. The Rule is not intended to replace those efforts, but rather to establish a floor for information that must be provided. The Rule is very specific about what information must be disclosed and when those disclosures must occur, and it is essential that employers comply with all of the Rule’s requirements.

The plan administrator named in the plan document, which in small plans is often the employer, is responsible for providing the required disclosures. However, plan administrators will not be held responsible for providing inaccurate or incomplete data if they reasonably rely in good faith on information provided by a service provider or the issuer of a plan investment. The rest of this article is intended to help you understand what the Rule requires and provide information about how Empower Retirement will assist you in meeting your fiduciary responsibility to provide these disclosures.

Plans and participants covered by the rule

The Rule applies to any participant-directed defined contribution plan subject to ERISA [e.g., 401(k), ERISA-covered 403(b), participant-directed profit-sharing plan, etc.] but does not apply to IRAs, SEPs or SIMPLEs. Required disclosures must be provided to all plan participants, employees eligible to

participate in the plan, beneficiaries with the right to control investment of their account and individuals who have an account in the plan due to a Qualified Domestic Relations Order (QDRO). For simplicity’s sake, “participant” will be used to refer to all categories of disclosure recipients throughout the rest of this article.

Initial disclosure to new employees

For new employees, the initial disclosure notice is due on or before the date when they are first eligible to direct investment of their plan account. For example, if an employee first becomes eligible to enter the plan on October 1, he or she would need to receive the initial disclosure notice on or before that date regardless of whether he or she chooses to enter the plan on that date.

Empower creates the participant fee disclosure notice, and it is included in enrollment material.

Quarterly disclosures

Participants must be given information at least quarterly about administrative and/or individual fees actually charged to their account during the preceding quarter. For example, if a participant took out a loan and a loan fee was charged, or if a per-head fee was assessed during the previous quarter, the participant would need to be told the amount of the charge expressed in dollars. This information can be contained in the quarterly statement. If there are no charges to a participant account (e.g., in the case of an employee who is eligible but has no plan account), no quarterly disclosure is required.

The fee information provided quarterly must include a general description of the services that were provided for any fees noted. To the extent administrative fees are taken from plan investments and are reflected in the expense ratio for an investment, quarterly disclosure of those fees is not required. However, if this type of fee is used, the quarterly disclosure



must state that some administrative fees are paid from a revenue-sharing arrangement.

Empower uses the quarterly statement to satisfy this requirement.

Annual disclosure

All of the information provided to participants in the initial disclosure must be updated and distributed to participants annually.

Empower creates and posts the notice on our participant and plan sponsor websites. The notices are updated monthly. Plan sponsors can hire Empower to mail the notice to participants for a charge of \$1.50 per mailing per participant. Plan sponsors can also choose to handle the distribution of the notice themselves by using the notice posted on the Plan Service Center (PSC) and downloading a list of the participants who need to receive the notice.

Disclosure in the event of change

Generally speaking, the annual disclosure notice can be used as the initial disclosure notice for newly eligible employees throughout the year and information does not need to be continually updated. However, if there is a change to any of the administrative or individual fee information, or to any of the general plan information (such as if a fund is added or deleted), participants must be notified of the change 30 to 90 days in advance of the change.

Empower Retirement provides templates that plan sponsors can use to create the required change communication for mailing to participants.

Information required in the initial/annual disclosure notice

There are three general categories of information that must be included in the initial and annual disclosure:

- General information about plan provisions related to investment decision-making
- A description of administrative or individual expenses that may be charged to participant accounts
- Investment-related information

Following is a more detailed description of this information.

General plan information

An explanation of the circumstances under which participants may give investment instructions.

- An explanation of any restrictions or limitations imposed by the plan on providing instructions, including any restrictions on transfers to or from a designated investment alternative. A designated investment alternative is an investment option made available in a plan for participants to invest in. It does not include brokerage windows.
- Information relating to the exercise of any voting or other rights attendant to a designated investment alternative.
- Identification of any designated investment alternatives offered by the plan.
- Identification of any designated investment managers.
- A description of any brokerage window or similar arrangement available to plan participants.

Administrative or individual expenses that may be charged to participants

Participants must receive an explanation of any fees for general plan administrative services, such as legal, accounting or recordkeeping services, that may be charged against participant accounts and are not reflected in the annual operating expenses of any of the plan's designated investment alternatives. The disclosure must also indicate the manner in which such charges will be allocated (e.g., pro rata, per capita, etc.). An example of this type of expense would be accounting, legal, a wrap fee or a flat fee charged at the plan level that is used to pay administrative expenses.

Administrative expenses that are set up on the Empower recordkeeping system are generally pulled into the notice. If, for whatever reason, a fee is not pulled into the notice, plan sponsors can work with their Empower account manager to list the expense within the notice. This scenario can happen when an expense is a one-time expense or varies from year to year and is not set up on the recordkeeping system.

Participants must also receive disclosure of expenses that may be charged individually to their account rather than on a plan-wide basis. This may include loan fees, QDRO processing fees, sales loads, fees for investment advice, fees for brokerage windows, optional rider charges in annuity contracts, etc., that are not reflected in the annual operating expenses of the plan's designated investment alternatives.

These fees, if applicable, are listed in the last section of the notice.

Investment-related information

Participants must receive information about both fees and performance of the investment options made available to them in the plan. This information must be presented in a comparative format so that participants can readily compare available options. Different disclosure rules apply depending on whether the investment has a variable rate of return (e.g., mutual funds or collective funds), a fixed rate of return (e.g., as a certificate of deposit, variable annuity fixed account, etc.), or is an annuity with a guaranteed stream of income. There are also special rules for qualifying employer securities.

Following is a general list of investment-related information that must be included in the initial and annual disclosure.

1. Identification of investment options

The name of the investment option as well as its general asset class (e.g., money market, large-cap stock, etc.) must be disclosed. Empower provides this information in the notice.

2. Investment performance

Variable rate of return investments: The notice must include the one-, five- and 10-year historical performance of the investment (or for the life of the investment, if shorter) compared to the performance of a broad-based index (such as the S&P 500, if appropriate) for the same time periods. Multiple benchmarks may be used where appropriate, such as in the case of a target date or balanced fund where no single index accurately reflects the investment style of the fund. The notice must also contain a statement to the effect that historical investment performance is not necessarily an indicator of future performance. These requirements apply to all variable rate of return investments, including employer securities.

Fixed return investments: The performance information required for fixed return investments, such as a GIC, is the fixed or stated annual rate of return and the term of the investment. For example, the disclosure might state that the rate of return is 3% for a two-year period. If the issuer has the right to adjust the return prospectively, the disclosure must also advise participants of that right, include the minimum guaranteed rate and tell participants how to get information about the most recent rate of return. Empower provides this information in the notice.

3. Fees and expenses

Variable rate of return investments: The disclosure must identify the total annual operating expense expressed both as a percentage and as a dollar amount per \$1,000 invested (e.g., 0.25% or \$2.50 per \$1,000). Any shareholder-type fees, such as a deferred sales charge, must also be disclosed. There must be a statement that fees and expenses are only two of several factors to be considered when making an investment decision and that the cumulative effect of fees can substantially reduce growth. Finally, the notice must include information about how to access the DOL's website or comparative site for examples demonstrating the long-term effect of plan fees.

Fixed return investments: The disclosure must identify the amount and description of any shareholder-type fees that may

apply as well as any restrictions on the ability to purchase, transfer or withdraw amounts invested. Empower provides this information in the notice.

4. Glossary

Participants must be provided with either a glossary of investment terms to assist them with understanding the notice or a website address where such a glossary can be accessed. Empower provides the glossary within the Plan Service Center (PSC) and participant websites.

5. Website address to access additional information

For every designated investment alternative, the disclosure must contain a website address where additional and more current information can be obtained. That address can be different for each investment, or it can be located on the participant website or at some other centralized location. The information that must be available on the website varies somewhat by the type of investment. The following information must be available:

- Name of investment issuer (and name of contract, fund or product if an annuity)
- Objectives and goals
- Principal strategies and risks (applies to variable rate of return investments other than employer securities only)
- Performance data updated at least quarterly (not required for annuities)
- Fee and expense information, updated at least quarterly (type of information required varies by investment category and is not required for employer securities held in shares instead of units)
- Portfolio turnover rate (applies to variable rate of return investments other than employer securities only)

6. Special disclosure rules – employer securities and guaranteed income

- Employer Securities: A number of special disclosure rules apply when employer securities are offered as an investment option, and the rules vary depending on the type of security involved (e.g., publicly or privately traded) and the type of accounting used for holding the employer security in the plan (e.g., unit-based, meaning both cash and stock are held as part of the same investment, or share-based, meaning the stock is held as a solo asset). If you have employer securities in your plan, please consult with your legal advisor about which special disclosure rules

apply. The website for employer securities must contain an explanation of the importance of a well-balanced and diversified investment portfolio.

This required information can be included in the notice.

- Guaranteed income options: If the plan contains any type of guaranteed income option, additional disclosure rules apply. The disclosure delivered to participants must include the price of guaranteed payments, any fees that could reduce the value of participant accounts and a statement that insurance company guarantees are subject to the long-term financial strength and claims-paying ability of the insurance company.

Empower provides this information within the notice.

7. Access to additional information

The disclosure must tell participants whom to contact for additional information and how to obtain paper copies of information required to be made available on the website free of charge. Participants are entitled to receive upon request copies of any prospectus or summary prospectus, or a similar document for any entity that is not required to produce a prospectus. They are also entitled to receive any financial statements or reports to the extent such reports are provided to the plan, a statement of the value of shares or units in any designated investment alternative and the date of the valuation, and a list and value of the assets comprising the portfolio of any designated investment alternative to the extent those assets are plan assets (e.g., funds held in a collective trust). Empower provides this service to participants on behalf of plan sponsors.

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1 S&P 500® Index is a registered trademark of Standard & Poor's Financial Services LLC, and is an unmanaged index considered indicative of the domestic large-cap equity market.

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